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No. 94-627

In The

# Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA, et al.,

*Appellants,*

vs.

RAY HAYS, et al.,

*Appellees.*

**On Appeal From A Three-Judge Panel Of The United States District Court For The Western District Of Louisiana**

## BRIEF OF APPELLANTS, STATE OF LOUISIANA, ET AL.

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## QUESTIONS PRESENTED

(1) Whether a state's congressional redistricting plan is always presumptively unconstitutional when the state intentionally creates a majority-black district.

(2) Whether Louisiana's majority-black 4th Congressional District, which was based on the State's historical district configurations and resembles previous majority-white congressional districts, is so bizarre on its face that it can be understood only as an effort to segregate voters by race.

(3) Whether District 4 is narrowly tailored to serve Louisiana's compelling interests in complying with the Voting Rights Act and ameliorating the effects of severely racially polarized voting.

(4) Whether the plaintiffs, none of whom resides in or near the challenged majority-black district, have standing to challenge the constitutionality of Louisiana's congressional redistricting plan.

(5) Whether the district court exceeded its authority by imposing, without a hearing, a court-ordered redistricting plan for future congressional elections which disregards valid state policy choices?

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ruling of the same court striking down Louisiana's first congressional redistricting plan enacted in 1992.

## OPINIONS BELOW

The district court's July 29, 1994, opinion declaring Act 1 to be violative of the Fourteenth Amendment is reported at 862 F. Supp. 119, and appears in the appendix to Louisiana's jurisdictional statement ("J.S. App.") at 1-21. The district court's order and judgment dated July 25, 1994, enjoining further elections under Act 1 and imposing a court-ordered congressional redistricting plan, is unreported and appears at J.S. App. 22-36. The district court's re-entered judgment dated December 9, 1994, is unreported and appears in the Joint Appendix ("J.A.") at 9-12. The district court's December 28, 1993 opinion, declaring Louisiana's first post-1990 congressional plan, Act 42 of the Regular Session of the 1992 Louisiana Legislature ("Act 42"), to be in violation of the Fourteenth Amendment, is reported at 839 F. Supp. 1188, and appears at J.S. App. 38-110.

## JURISDICTION

The judgment that Act 1 violates the Fourteenth Amendment was entered on July 25, 1994. Appellants filed a notice of appeal to this Court on July 29, 1994. J.S. App. 125. The appeal was docketed within 60 days of July 29, 1994. The district court re-entered its judgment on December 9, 1994, and the Appellants filed their notice of appeal from the new judgment on December 12, 1994.[1] J.A. 235. This Court noted probable jurisdiction on December 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

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[1]This Court, on December 9, 1994, directed the district court to re-enter its judgment (No. 94-627, Order, Dec. 9, 1994), because the district court's July 25, 1994 judgment was jurisdictionally defective, having been entered before this Court sent down its judgment as to the State's first appeal. After filing their notice of appeal on behalf of defendants on December 12, 1994, appellants filed an amended notice of appeal on January 6, 1995, which listed each State defendant but was otherwise unchanged. J.A. 236.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*See* J.S. App. 111-124.

## STATEMENT OF THE CASE

### A. *The State's First Congressional Redistricting Plan (Act 42)*

The results of the 1990 Census required Louisiana to redraw its congressional districts to meet one-person, one-vote requirements. The number of Louisiana's seats was reduced from eight to seven. The 1990 Census showed that Louisiana's population of 4.2 million persons was 30.6% black (28% black in voting age population). No black person was elected to Congress from Louisiana from the end of Reconstruction until the State's first majority-black district was created in the 1980's. That district was created after Louisiana's 1981 congressional redistricting plan, which contained only majority-white districts, was struck down by a federal court for unlawfully diluting black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court). In addition, no black person has ever been elected to a statewide office in Louisiana in this century, and no black person has been elected to the state legislature from a district with a white registered voter majority. *Id.* at 341; Report of Dr. Richard Engstrom, State Ex. 13, J.A. 188.

In May 1992, the Legislature enacted its congressional redistricting plan, Act 42 of the 1992 Regular Session. Act 42 created two majority-black congressional districts and received the necessary preclearance from the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[2]

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[2]Louisiana's congressional redistricting efforts in 1992 had their roots in the 1991 redistricting of the state's Board of Elementary and Secondary Education (BESE). Districting plans for BESE have historically paralleled congressional district boundaries. The State's 1991 redistricting plan for BESE created only one district out of eight that contained a majority-black population. When Louisiana submitted the BESE plan to the United States Attorney General for

B. *The Legal Challenge to Act 42.*

On July 22, 1992, four residents of Lincoln Parish, appellees here, filed suit alleging that Act 42 violated their rights under, *inter alia*, the Equal Protection Clause and Section 2 of the Voting Rights Act. The three-judge district court held a preliminary injunction hearing and denied plaintiffs' constitutional claims on August 27, 1992, but took plaintiffs' Section 2 claims under advisement.

On June 28, 1993, this Court decided *Shaw v. Reno*, 113 S.Ct. 2816 (1993). On August 19-20, 1993, the district court held a two-day trial to determine whether Louisiana's plan violated the constitutional standard set forth in *Shaw*. On December 28, 1993, the court issued an opinion and order holding that Act 42 violated the Equal Protection Clause. J.S. App. 38-110. Applying strict scrutiny, the court held that Act 42, assuming it was supported by a compelling state interest, was not narrowly tailored. The court found that District 4, with a black voting age population ("VAP") of 63%, packed more black voters into the district than were "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there." J.S. App. 83. The court criticized the unusual shape of District 4 (J.S. App. 62; *see* map, J.S. App. 91),[3] and reasoned that "a second majority black district could have been drawn that would have done substantially less violence to traditional redistricting principles." J.S. App. 86. The court also

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preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the Attorney General denied preclearance on the ground that the state had not sustained its burden of proving that the decision to create only one majority-black district was free of racially discriminatory purpose. State Ex. 16-17 (1992 Trial). A second BESE plan creating two majority-black districts subsequently received Section 5 preclearance.

[3]District 4 in Act 42 was more than 600 miles long, beginning north of Shreveport on the Texas and Arkansas borders, traversing east along the Arkansas border to the Mississippi River, then proceeding south along the river toward Baton Rouge and other points in south Louisiana. The testimony at trial in 1993 revealed that the Legislature, in creating a second majority-black district, had employed the specific elongated configuration in Act 42 so as to accommodate partisan political concerns. *See, e.g.*, Tr 97, Vol. I, 1993 Trial; Tr. 123, Vol. I, 1992 Trial.

found that a district with a black voting age population of not more than 55% would have been adequate to ensure that black citizens could elect a candidate of their choice. J.S. App. 85.

The State appealed the decision to this Court. While the State's appeal to this Court was pending, the Legislature repealed Act 42 and enacted a new congressional plan, Act 1 of the 1994 Second Extraordinary Session. *See* map, J.S. App. 129.

C. *The State's Second Congressional Redistricting Plan (Act 1)*

The assignment to redraw the congressional boundaries fell initially to the State Senate's chief demographer, Glenn Koepp. The Senate leadership asked Koepp to determine if a plan could be created that would meet the concerns expressed by the court in *Hays*, while still creating two majority black districts.[4] Koepp began by reviewing Louisiana's prior congressional districts during the 1970's and 1980's, because the leadership had asked him to see if the State could "maintain what we had obtained in the past." Koepp Test., Senate Comm. Tr. 14, J.A. 147.[5] For 25 years (1967-1992), Louisiana had drawn its 8th Congressional District in a rough diagonal that followed parishes along the Red River

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[4]Koepp Test. 7/21/94 a.m. Tr. 5-8, J.A. 32-35. Koepp recognized that if the only way to create a second majority-black district was to create a "bizarre" district, he should not propose such a plan because "the legislature would not have adopted it." *Id.*, Tr. 33-34, J.A. 48. As Koepp explained: "It wasn't just that you had to do it [*i.e.*, draw two majority black districts], you either had to show that you can do it and meet this Court's requirements . . . and have a second minority district or you couldn't do that." *Id.*, J.A. 49. [In this Brief, references in the form "Koepp Test. 7/21/94 a.m. Tr. 5-8" designate the 1994 trial transcripts, which are numbered separately for morning and afternoon sessions. "Senate Comm. Tr." or "House Comm. Tr." refers to the April 18, 1994 transcripts of hearings of the Louisiana Senate Committee on Senate and Governmental Affairs and the Louisiana House and Governmental Affairs Committee, respectively.]

[5]"I told Mr. Koepp that I suggest . . . that you use a district which is somewhat traditional . . . and gave him the Eighth Congressional District as one he might look at, not knowing exactly what was going to come out of that; but knowing there was a lot of tradition[ ] there in the district." Testimony of Senator Bagneris, 7/21/94 p.m. Tr. 105, J.A. 87.

Valley extending from the northwest and central parts of the State to areas along the Mississippi River, ending south of Baton Rouge. J.S. App. 130-33 (maps of Louisiana congressional redistricting plans, 1967-1992). The Red River and Mississippi River regions which overlap with the old 8th District have substantial concentrations of black citizens.[6]

Koepp drew numerous plans prior to the special legislative session in April 1994. Koepp Test., 7/21/94 a.m., Tr.6, J.A. 34. Senate Bill 1 became the plan eventually enacted as Act 1. New District 4, as drawn in Act 1, generally follows the Red River-Mississippi River axis on which the old 8th District had been centered, and includes a black voting age population of 54%. State Ex. 13, J.A. 181.[7] During the legislative proceedings on Act 1, legislators noted the correspondence between District 4 and previous versions of the old 8th. As State Representative Copelin stated in the hearings before the House Committee, District 4 under Act 1 "is basically the same district that Gillis Long had for years[.]" Copelin Test., House Comm. Tr. 46, J.A. 142.[8]

In adopting Act 1, the Legislature recognized that voting is

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[6]Koepp Test. 7/21/94 a.m. Tr. 13-14, J.A. 38-39; Testimony of Dr. Sam Hilliard, 7/21/94 p.m. Tr. 66-67, J.A. 82.

[7]District 4 in Act 1 is approximately 250 miles long, similar to the length of the old 8th District in the late 1960s and early 1970s. U.S. Ex. 8 at Table I. Act 1 divides 14 parishes, compared to 28 parishes split in Act 42. Louisiana's congressional plan in the 1980s split 7 parishes. J.S. App. 65.

[8]*See also* Jetson Decl., Def. Ex. 18, J.A. 201 (noting discussion on House floor and in House Governmental Affairs Committee of District 4's "historical advantage of having been the basis for prior congressional districting" and its "reflect[ion] [of] a traditional approach to redistricting"); Bagneris Test., 7/21/94 p.m. Tr. 117-18, J.A. 93-94. The Red River corridor has long been recognized as an important region of the state, and District 4 encompasses persons with commonalities of interest, including income levels, job status, education, and social concerns. Hilliard Test., 7/21/94p.m. Tr. 37-38, 47-49, 57, 66-67, 90, J.A. 71-72, 75-76, 78, 82, 90; Declaration of State Representative Jetson, State Ex. 18, J.A. 200-01; Declaration of State Representative Accardo, State Ex. 16, J.A. 196; Report of Prof. Olethia Davis, U.S. Ex. 8, J.A. 225-27; Bagneris Test., 7/21/94 p.m. Tr.116, J.A. 93.

extremely racially polarized in Louisiana and that black citizens, who comprise 30.6% of the population, do not enjoy an equal opportunity to elect their preferred candidates to Congress unless they constitute a majority of the voters in a district.[9] The State sought to balance "[c]ompactness, contiguity, the political boundaries, the geographic boundaries, the . . . community interest, . . . party consideration[s] such as incumbency"[10], as well as the Voting Rights Act. Bagneris Test., 7/21/94 p.m. Tr. 120. According to Koepp, "What we were doing was attempting to meet *all* of the criteria[.]" Koepp Test., 7/21/94 a.m. Tr. 33, J.A. 48 (emphasis added). Act 1 was signed into law on April 25, 1994, and received the necessary Section 5 preclearance from the United States Attorney General on June 3, 1994.

Following the enactment of Act 1 in April 1994, this Court vacated the December 28, 1993 decision of the three-judge court and remanded the case for further proceedings in light of Act 1. *Louisiana v. Hays*, 114 S.Ct. 2731 (1994).

D. *The Legal Challenge to Act 1*

On June 16, 1994, the appellees sought leave to supplement and amend their complaint to challenge Act 1, alleging that the State drew Act 1 with the goal of creating two majority black congressional districts and that the districts were "based upon the segregation of the citizens of Louisiana by race" (First Supple-

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[9]Koepp Test., 7/21/94 a.m. Tr. 22-23, J.A. 43-44; Bagneris Test., 7/21/94 p.m. Tr. 106-07, 110, J.A. 87-90; Testimony of Sen. Brinkhaus, 7/22/94 a.m. Tr. 22-23, 34-36, J.A. 111-12, 116; Accardo Decl., State Ex. 16, J.A. 196. Statistical evidence confirms that voting patterns in Louisiana elections are severely polarized along racial lines. *See infra* at n. 37 (summarizing statistical evidence of racially polarized voting patterns in Louisiana elections).

[10]Koepp declined to use the specific plan presented to him by the congressional incumbents, Koepp Test. 7/21/94 a.m. Tr. 45, J.A. 53-54, but the Legislature made some adjustments in Senate Bill 1's configuration to satisfy incumbents' concerns about the political make-up of the district. *Id.*, Tr. 47-48, J.A. 54-55; Bagneris Test., 7/21/94 p.m. Tr. 119, J.A. 94. In the end, with one exception (black incumbent Rep. Cleo Fields), all of the incumbents publicly supported the new plan. Koepp Test., 7/21/94 a.m. Tr. 46, J.A. 54.

mental and Amended Petition at ¶ 15.)[11] The plaintiffs did not allege that the district in which they reside under Act 1, District 5, is noncompact, although they did make that allegation as to Districts 4 and 6 in Act 1. Amended Pet. at ¶¶20-21.

On June 28, 1994, the day after this Court vacated the district court's December 1993 judgment, the district court scheduled trial on the merits of plaintiffs' new claims to begin on July 21, 1994. The court directed that the State, not the plaintiffs, would be required to proceed first with its proof.[12] The court also granted the motion of the United States to intervene as of right, but denied motions to intervene filed by black residents of District 4 and the Louisiana Legislative Black Caucus.

Trial was held on Thursday and Friday, July 21-22, 1994, with the defendants required to proceed first.[13] At the conclusion

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[11]The Amended Petition alleged claims under a variety of federal and state constitutional and statutory provisions, Amended Pet. at ¶ 15, but at trial plaintiffs requested judgment only on their Fourteenth Amendment claim. 7/21/94 p.m. Tr. 4 (argument).

[12]As recognized in this Court's order of December 9, 1994, the district court held trial and entered judgment in this matter before this Court had even sent down its judgment on July 27, 1994. Louisiana vigorously protested the trial schedule because it afforded insufficient time properly to defend the action and improperly placed the burden of proof on the State. The State filed a motion seeking relief from these decisions on July 11, 1994. *See* Motion for Continuance of Trial on Merits or, in the Alternative, for Severance of the Preliminary Injunction Hearing from the Trial on the Merits and for Other Relief. The district court denied the State's motion without opinion the same day. J.A. 5.

[13]The State called the Senate's chief demographer, Glenn Koepp, and several legislators, who explained the considerations behind Act 1 and testified that the plan reasonably conforms to Louisiana's traditional redistricting practices while creating two majority-black congressional districts. The State and the United States also presented, among other evidence, expert testimony and exhibits establishing the extent of racially polarized voting in Louisiana, the state's history of racial discrimination against black citizens, and Act 1's recognition of regional, economic, and cultural commonalities in Louisiana. Report of Dr. Richard Engstrom, State Ex. 13, J.A. 181-93; Report of Dr. Peyton McCrary, U.S. Ex. 9, J.A. 202-219; Report of Drs. Sam Hilliard and George

of the State's case, without requiring rebuttal from the plaintiffs, the court recessed for twenty minutes and, on reconvening, granted the plaintiffs' oral motion for judgment as a matter of law, holding Act 1 unconstitutional and enjoining the State from holding future elections, including the scheduled fall 1994 elections, under Act 1. Tr. 51, J.A. 134. On Monday, July 25, 1994, the district court, without holding a hearing or providing opportunity for comment, ordered into effect its own redistricting plan, substantially revising Louisiana's entire congressional redistricting plan. J.S. App. 22-36. Under the court's plan, the highest black population percentage in any district outside of District 2 is 33 percent. J.S. App. 30. The court's judgment requires the State of Louisiana to obtain permission from the district court before implementing any alternative redistricting plan. J.S. App. 23.

The district court entered its written opinion on July 29, 1994. The court ruled that, because District 4 was drawn with the "specific intent" to create a majority-black district, it was subject to strict scrutiny under *Shaw*. J.S. App. 3-4; *see also* J.S. App. 5 ("[r]ace conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny"). The district court further ruled that the map of Act 1 demonstrated that District 4 was "bizarre" under *Shaw*, placing the burden on the State to rebut the inference that it was a racial classification. J.S. App. 2-3. The court ruled that District 4's resemblance to previous white-majority districts created by Louisiana was legally irrelevant, and alternatively that the State's reliance on such factors was "mere pretext" for the presumptively unconstitutional purpose of intentionally drawing a majority-black district. J.S. App. 4. The district court also ruled that the State had no compelling interest in creating a second majority-black congressional district. J.S. App. 6. Chief Judge Shaw issued a separate opinion, joined by

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Castille, U.S. Ex. 8; Report of Prof. Olethia Davis, U.S. Ex. 11, J.A. 220-27. The plaintiffs presented no testimony, either live or in affidavit form, confining their evidentiary submission to documentary evidence including maps of Act 1 and statistics on the racial composition of the districts or of areas within the districts.

Judge Wiener, which largely paralleled the court's opinion. J.S. App. 12-21.

The State defendants and the United States sought a stay of the district court's judgment, which this Court granted on August 11, 1994. *Louisiana v. Hays*, No. A-64.

## SUMMARY OF ARGUMENT

In striking down Louisiana's second post-1990 congressional redistricting plan and imposing its own plan for congressional elections, the district court seriously misconstrued this Court's decision in *Shaw v. Reno*. As every witness at trial agreed, Act 1 constitutes a successful effort to employ traditional Louisiana redistricting principles, historical congressional district configurations, and one-person, one-vote standards, while creating two districts in which black voters will have a reasonable opportunity to elect candidates of their choice despite the severely racially polarized voting that exists in Louisiana. District 4, the focus of this litigation, has only a 54% black voting age population, and is drawn in the same general area as previous white-majority congressional districts, which it resembles. *Shaw* simply did not provide the district court with the authority to cast aside the State's reasonable, legislatively drawn plan in favor of the district court's own conception of a preferable redistricting plan.

I. A. The court below erroneously held that a redistricting plan must be presumed unconstitutional if the State intentionally created a majority-black district, regardless of whether the State also employed and balanced other traditional redistricting principles. This mistaken view of *Shaw* led the district court to treat all of the other factors considered by the Legislature as mere "pretext" for the presumptively forbidden purpose of creating a black-majority district. This holding seriously misconstrues *Shaw*. In the absence of any claim of improper vote dilution, Shaw requires strict scrutiny only when a redistricting plan is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 113 S.Ct. 2824. If the mere purpose of drawing a majority-black district were sufficient to make out the claim recognized in *Shaw*, the Court's

careful emphasis on "bizarre" district configurations would be inexplicable. Moreover, because majority-minority districts are almost never created "accidentally," as the district court would have it, the district court's rule would mean that virtually every majority-minority district in the nation is presumptively unconstitutional. No such result was intended in *Shaw*.

B. The district court erred in holding that Act 1's configuration is so "bizarre" or "highly irregular" on its face that it cannot rationally be understood except as an effort to segregate voters. A "bizarre" district, at a minimum, is a district that departs dramatically from the State's prior redistricting practices. District 4 resembles previous versions of the majority-white 8th Congressional District and, like those earlier districts, is generally centered on the Red River and Mississippi River. When a majority-black district resembles, in configuration, previous majority-white districts, it is illogical to argue that the district "on its face" can be viewed only as an effort to segregate voters. *Cf. Shaw*, 113 S.Ct. at 2824. The district court erred in ruling that District 4's resemblance to previous majority-white districts drawn by the State was legally *irrelevant* under *Shaw*.

To be sure, the district court had numerous criticisms of Act 1. Although Act 1 was dramatically more compact than the plan it replaced, the district court believed that an even more compact plan would be superior. The district court also believed that a preferable congressional plan would place Protestants and Roman Catholics in separate districts and would not combine different agricultural crops in the same district. Such preferences, however, do not provide the basis for an Equal Protection challenge under *Shaw*. If a majority-black congressional district may be deemed "bizarre" under *Shaw* whenever it departs from a district court's subjective ideal of compactness, or fails to maximize the other values singled out by the court below, the careful limits in *Shaw* will be eviscerated, and the preferences of individual federal judges will become the standard by which the constitutionality of legislatively enacted redistricting plans is measured. District 4 does not reflect an extreme departure from Louisiana's traditional redistricting principles and does not fall into the narrow category

of "bizarre" redistricting plans which are constitutionally suspect under *Shaw*.

II. The district court further erred in dismissing as inadequate all of the compelling state interests supporting Act 1. The inclusion of two majority-black districts in Act 1 was narrowly tailored to further Louisiana's compelling interest in complying with Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c, and in assuring that racially polarized voting does not exclude the State's black citizens from equal access to the political process. In Louisiana, black citizens constitute nearly 30% of the population, but no black person has ever been elected either to Congress or the Louisiana legislature from a district with a white registered voter majority, nor has any black person ever been elected to a statewide office in Louisiana in this century. As these statistics suggest, voting is severely polarized along racial lines in Louisiana, and black voters are unable to elect candidates of their choice to office unless they constitute a majority in a district. District 4 in Act 1, with a slim 54% majority of black voters, does not unnecessarily "pack" black voters and reflects a reasonable balance of traditional Louisiana redistricting principles. Accordingly, even if Act 1 is subject to strict scrutiny as an intentionally created majority-black district, the careful manner in which it was crafted, and the substantial justifications for its creation, more than suffice to satisfy the requirements of the Fourteenth Amendment.

III. Plaintiffs lack Article III standing to assert a challenge to Act 1 under *Shaw*. None of the plaintiffs resides in District 4. Instead, plaintiffs reside in a compact, predominantly white district, District 5. Plaintiffs did not even allege, much less prove, that the compactness or racial composition of their district of residence would be materially affected by the invalidation of Act 1. None of the plaintiffs testified at the trial on Act 1, and the record is devoid of any allegation or proof of injury-in-fact, causation, or redressability, each of which is necessary to support standing.

IV. The court erred in imposing its preferred congressional plan for use in future elections in Louisiana, without allowing the state an opportunity to enact a remedial plan and without holding

any hearing or providing an opportunity for comment upon the court's redistricting plan. The district court's plan also conflicts with this Court's instructions in *Upham v. Seamon*, 456 U.S. 37 (1982), because the court's plan improperly reconfigures all of Louisiana's congressional districts and disregards the State's legitimate policy choices.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN TREATING LOUISIANA'S CONGRESSIONAL REDISTRICTING PLAN AS SUSPECT AND PRESUMPTIVELY UNCONSTITUTIONAL.

#### A. The District Court Erred in Holding That Any Intentional Creation of a Majority-Black District Renders Louisiana's Congressional Plan Presumptively Unconstitutional under the Fourteenth Amendment.

The court below misread *Shaw v. Reno* to establish a sweeping new basis for judicial invalidation of redistricting plans: any intentional creation of a majority-black election district renders a state's congressional redistricting plan constitutionally suspect. According to the district court, "[r]ace conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5; *see also Hays I* (strict scrutiny applies whenever creation of majority-black district is "*intentional*, not . . . accidental," J.S. App. 47).

The district court erred as a matter of law by adopting this unprecedented legal standard. Contrary to the district court's understanding, *Shaw* "express[ed] no view as to whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim." 113 S.Ct. at 2828. *Shaw* does not authorize federal courts to presume the unconstitutionality of a redistricting plan unless the plan is so bizarre *on its face* that it can *only* be understood as an effort to segregate voters by race. 113 S.Ct. at 2824. The district court's critical misreading of *Shaw* structured a deeply flawed inquiry dependent on calculations of legislative intent to create a black-majority district, which is not in itself suspect under *Shaw*.

The State's demographer and the legislators who testified did not, of course, deny that they intended to create a majority-black district if that could be done while giving reasonable recognition to other traditional redistricting principles and Louisiana's historical district configurations. For the district court, however, the salient fact under *Shaw* was the admission that the Legislature harbored a desire to create a black-majority district. *E.g.*, *Hays II*, J.S. App. 3 ("Those persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature"); *see also id.*, J.S. App. 4. Because of that admission, other considerations which may have also been employed in creating the district became "mere pretext" for what the court deemed the inherently improper purpose of deliberately creating a district with a majority-black population. *Id.* On this reading, majority-black districts may still be created without making a redistricting plan constitutionally suspect, but only if the legislative record does not indicate a specific purpose or intent to create a majority-black district.[14]

That is clearly not a rule imposed by the Fourteenth Amendment nor created by this Court in *Shaw*. *Shaw* addressed the constitutional limitations which may apply to redistricting plans even when, like Act 1, they are not alleged to dilute the voting strength of a cognizable group or otherwise to interfere with the right to vote. When the legislature concededly has not adopted a plan "'because of' . . . its adverse effects upon an identifiable group," *see Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (citations omitted), and when the legislature's plan in actual effect does not proportionally underrepresent white

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[14]As the court explained in *Hays I*: "For example, if a legislature devises a redistricting plan that separates river districts from mountain districts, and more blacks happen to live along the rivers, and more whites happen to live in the mountains, then the plan is not a product of racial gerrymandering, even though it entails some coincidental segregation. In short, *de facto* or accidental segregation is not constitutionally suspect, but state-sponsored intentional segregation is, irrespective of the legislature's underlying motives." J.S. App. 47-48.

voters, this Court's holding in *Shaw* nevertheless permits an Equal Protection challenge to a majority-black district in narrow circumstances: only when the resulting reapportionment plan is "so extremely irregular on its face that it rationally can be viewed *only* as an effort to segregate the races" 113 S.Ct. at 2824 (emphasis added).

This Court in *Shaw* deliberately and repeatedly emphasized the narrow, *facial* test to be employed in determining when a nondilutive plan may be deemed constitutionally suspect.[15] Therefore, contrary to the district court's holding, the "analytically distinct" claim recognized in *Shaw* applies, not to every districting plan in which race might have been considered, but only to "those '*rare*' statutes that . . . are, *on their face*, 'unexplainable on grounds other than race.'" 113 S. Ct. at 2825 (citation omitted) (emphasis added). If the mere purpose of drawing a black majority district were sufficient to make out the claim recognized in *Shaw*, the Court's formulation of its standard would be inexplicable.[16]

The district court's legal standard is unworkable because it ignores the practical circumstances under which redistricting takes

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[15]*See, e.g.*, 113 S.Ct. at 2824 ("legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races"); 2826 ("plan . . . so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race") (citation omitted); 2829 ("plan, on its face, . . . so highly irregular that it rationally could be understood only as an effort to segregate voters by race); 2829 ("plan . . . so irrational on its face that it immediately offends principles of racial equality"); 2832 ("scheme so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race").

[16]The district court's much broader rule requiring strict scrutiny for any race-conscious redistricting is ostensibly grounded in precedents addressing facially neutral legislation which is actionable because its adverse effects on the complaining party were motivated by a racially discriminatory purpose. *See Hays II*, J.S. App. 6 (quoting *Feeney*, 442 U.S. at 272); Hays II, J.S. App. 48 (citing *Washington v. Davis*, 426 U.S. 229 (1976)). This Court, however, took note of such precedents addressing proof of invidious racial purpose, *see Shaw*, 113 S.Ct. at 2824-25, but deliberately chose to define a narrow claim dependent upon proof

place. Majority-minority districts are almost never created "accidentally," without an express intent to create them. In many states, the objections of white incumbents must often be overcome in order to draw any non-white majority district. In virtually every state, the redistricting process is highly politically charged and intensely competitive. It is highly unlikely that a majority-black district will emerge from that process "coincidental[ly]." *Cf. Hays I*, n.13, J.S. App. 47. A rule treating the intent to draw a majority-black district as direct evidence of unlawful racial discrimination, making the resulting redistricting plan presumptively unconstitutional, thus would render legally suspect the redistricting plans of virtually every state in the union which has a majority-black district.[17]

The impact of a rule which effectively forbids the intentional consideration of race in constructing districts would not, of course, be limited to majority-black districts. Legislators routinely consider the race, ethnicity and religion of populations to be included in white-majority districts as well as non-white majority districts. This is unsurprising, given that political affiliations are often tied in predictable ways to membership in racial, ethnic and religious groups. A blanket application of strict scrutiny to such redistricting practices would, therefore, render presumptively unconstitutional countless white-majority districts as well as black-majority districts.

*Shaw* did not endorse such an unrealistic application of the Fourteenth Amendment to the redistricting process. To be sure,

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of a district configuration "so irrational on its face that it can be understood *only* as an effort to segregate voters." 113 S.Ct. at 2832 (emphasis added).

[17]Just 10 years ago, a federal district court chastised the Louisiana legislature for literally locking minority legislators out of a crucial meeting on redistricting which determined whether Louisiana's first majority-black congressional district would be created. *Major v. Treen*, 574 F. Supp. at 353 (finding State's plan in violation of Section 2 of Voting Rights Act). Now, the district court and the plaintiffs would impose a rule having precisely the same effect: minority citizens and legislators would be unable to request the creation of a black-majority district without rendering the resulting plan suspect.

the Court's precedents have shown careful attention to the potential dangers of race-conscious state action. *Shaw*, 113 S.Ct. at 2824-30. But the Court has also shown a great sensitivity to the importance of the states' traditional role in conducting redistricting and to the political realities that attend that role, as well as to the dangers of excessive federal court involvement in the redistricting process. *See Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975). A constitutional rule triggering a presumption of invalidity for any plan as to which race was intentionally considered, in the absence of any injury resulting from dilution of voting strength, would excessively court those dangers. Such a rule would invite endless litigation examining the thought processes of individual legislators so as to discern the consideration of racial demographics during redistricting; and, given the nature of the redistricting process, such evidence would frequently be found. As members of the Court have repeatedly noted, redistricting involves "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." *See Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).[18]

*Shaw* recognized this practical reality as well, noting that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors[.]" 113 S.Ct. at 2826. For these reasons, the Court deliberately declined

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[18]This is why the Court, in *Davis v. Bandemer*, concluded that intent could not be the standard for determining when a redistricting plan constitutes an impermissible political gerrymander. *Id.* at 138-41. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 607-08 (1993) (arguing that standard applying strict scrutiny for all intentional consideration of race in redistricting "would strike a severe blow to the redistricting process precisely because it would be exceedingly difficult, given the prevalence of race as a factor in 'ordinary' districting decisions, to articulate a coherent justification for any districting plan, let alone a plan that expressly relied on race as a contributing rationale").

to adopt the rule proposed by the plaintiffs and the district court. Thus, a redistricting plan does not become presumptively invalid under *Shaw* simply because a legislature draws lines to recognize minority voting strength while also giving reasonable weight to other redistricting criteria and political and demographic variables.

The district court's rule requiring strict scrutiny of any plan intentionally creating a majority-black district would also create an intolerable conflict with states' obligations to assure compliance with the Voting Rights Act. Sections 2 and 5 of the Act both require states to consider carefully the likely impact of their redistricting plans on minority voters.[19] States that draw majority-minority districts to assure that they do not dilute minority voting strength *always* do so intentionally — not "accidentally" or "coincidentally." Consequently, the creation of such districts, under the rule adopted by the court below, would *always* subject the state's plan to strict scrutiny. *Hays II*, J.S. App. 5. It is a perverse rule of law indeed which holds that compliance with a valid act of Congress immediately makes the resulting redistricting plan constitutionally suspect under the Fourteenth Amendment.[20]

If a state's intentional creation of a majority-black district au-

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[19]Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, makes unlawful any state redistricting plan which, under the totality of circumstances, results in a denial of equal political opportunity to racial and language minorities. *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986). Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires the United States Attorney General to deny preclearance to a redistricting plan if the State is unable to demonstrate the absence *both* of any discriminatory intent *and* any discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973). Under long-standing Section 5 regulations, evidence that a state has taken into account the views of minority citizens is relevant in determining whether the state has carried its burden under Section 5. 28 C.F.R. § 51.57(d)(1994).

[20]Other courts have not read *Shaw* to impose such an implausible result. *See DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. June 27, 1994) (granting summary judgment upholding California redistricting plan which "evidence[d] a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's

tomatically subjected its plan to strict scrutiny, states would be forced to choose between drawing race-conscious districts and facing a Fourteenth Amendment challenge, or ignoring race and facing a Voting Rights Act challenge. The lawsuits faced by the State of Louisiana after each of the last two Censuses, through which the state's congressional redistricting plans have been struck down three times in 11 years, demonstrate that this scenario is anything but conjectural. The end result of such a legal regime would be the wholesale transfer of the reapportionment process to the federal judiciary, contrary to the central principle that state governments bear primary responsibility for redistricting. *See Voinovich v. Quilter*, 113 S. Ct. at 1156. The district court erred in reading *Shaw* to create a rule of presumptive unconstitutionality for all intentionally created majority-black districts.

B. Act I Is Not "Bizarre" and Constitutionally Suspect Under *Shaw v. Reno.*

Because of its concerns about the potential dangers of race-based redistricting, this Court in *Shaw* instructed that Fourteenth Amendment strict scrutiny applies to districts so "bizarre" "highly irregular," "dramatically irregular" and "tortured" that they can rationally be understood only as an effort to accomplish racial segregation. 113 S.Ct. at 2826, 2827, 2829. This standard, however, must be given content in a manner that does not simply license federal courts to impose their varying subjective ideals of an enlightened redistricting plan as a constitutional norm which state legislatures must follow. Plainly, this Court in *Shaw* singled out the most extreme configurations, not plans that merely fail to

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objective of assuring that minority voters are not denied the chance to effectively influence the political process", *id.* at 1413), (three-judge court) juris. statement filed, No. 94-275 (Aug. 8, 1994). Indeed, of the lower courts considering *Shaw* challenges to majority-minority districts, only the North Carolina district court has endorsed the ruling of the court below on this point. *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), (three-judge court) juris. statement filed, No.94-923 (Nov. 21, 1994) (holding that strict scrutiny applies whenever a legislature intentionally creates a black-majority district, regardless of configuration, *id.* at 431, but finding that compelling state interest supported creation of majority-minority districts in North Carolina, *id.* at 474-75).

achieve maximum compactness; otherwise, the Court would simply have referred to "noncompact" district configurations as the trigger for the analytically distinct cause of action it recognized in *Shaw*.[21] Act 1 simply does not fall under the narrow category of "bizarre" and "irrational" redistricting plans singled out in *Shaw*.

1. The District Court Erred in Ruling That Louisiana's Historical District Configurations Were Legally Irrelevant to the Constitutionality of Act 1.

The court below ruled that a district's resemblance to configurations historically employed by a state is irrelevant in assessing whether the challenged district is "bizarre" under *Shaw*. This was error. *Shaw* expressly declined to constitutionalize a compactness requirement for congressional districts. 113 S.Ct. at 2827.[22] Therefore, the state's own redistricting practices and historical district configurations are directly relevant as objective benchmarks for assessing whether a majority-black district is "bizarre." A district is not "bizarre" and presumptively unconstitutional unless it departs dramatically from the state's traditional districting

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[21] *See Vera v. Richards*, 861 F. Supp. 1304, 1344 (S.D. Tex. 1994), (three-judge court) juris statement filed, No. 94-805 (Dec. 1, 1994) (although majority-Hispanic district was approximately 250 miles long and split political subdivisions, district was permissible under *Shaw* because "the Legislature took no extraordinary measures that render this district so out of line with traditional redistricting criteria as to raise a serious question about racial gerrymandering"); *Johnson v. Miller*, 864 F.Supp. 1354, 1395 (S.D. Ga. 1994), prob. juris. noted, No. 94-631 (January 6, 1995). (Edmondson, J., dissenting) (extension of *Shaw* to districts not extremely irregular in shape "would diminish in important ways the traditional freedom of states to apportion themselves for Congressional purposes without federal judicial supervision").

[22] There is no agreed-upon standard for determining compactness. Numerous different quantitative methods have been proposed, but all are subject to criticism and may produce widely disparate evaluations of the compactness of a single district; none commands a consensus among researchers. *See* H.P. Young, *Measuring the Compactness of Legislative Districts*, 13 Leg. Stud. Q. 105, 113 (1988) (surveying different compactness measures and concluding that "compactness is

practices. *See Cane v. Worcester County, Maryland*, 35 F.3d 921, 926-27 n. 6 (4th Cir. 1994) (majority-black district not "bizarre" under *Shaw*, despite some irregularities, when it is "similar in appearance" to former residency districts) *pet. for cert. filed*, No. 94-995 (Dec. 2, 1994); *cf. Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989) (three-judge court) (proposed majority-black districts acceptable for purposes of Section 2 claim where they are "not materially stranger in shape" than other legislatively drawn districts), *aff'd mem.*, 498 U.S. 1019 (1991).[23]

A comparison of District 4 in Act 1 with Louisiana's former majority-white 8th Congressional District, as it existed from 1967 to 1992 (J.S. App. 129-33), shows that the court's finding of "bizarreness" is insupportable. For 25 years the Louisiana Legislature drew the 8th Congressional District in a rough diagonal that included Red River Valley parishes in the northwest and/or central parts of the State and extended south of Baton Rouge. The new 4th District is configured along the same axis, generally following the Red River and the Mississippi River. The maps of the congressional plans themselves, as well as the unrefuted trial testimony, confirm that District 4 "on its face" resembles past majority-white districts in Louisiana.[24] *Compare* J.S. App. 129 (map of Act 1) with J.S. App. 130-33 (maps of previous Louisiana congressional plans). If anything, the new 4th appears more compact than some of the versions of the old 8th District, particularly the

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such a hazy and ill-defined concept that it seems impossible to apply it, in any rigorous sense, to matters of law"); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. Rev. 77, 85 (1985) ("There are many different ways of applying a compactness requirement but none is generally accepted as definitive").

[23] *See also Johnson v. Miller*, 864 F. Supp. at 1396 (Edmondson, J., dissenting) (noting that comparison between challenged district and other districts drawn by the state is an important factor in determining whether a challenged district is "bizarre" under *Shaw*).

[24] *See* Hilliard Test. 7/21/94 a.m. Tr. 53, J.A. 76 ("strong resemblance"); Koepp Test., Senate Comm. Tr. 49, J.A. 152 ("a lot of similarities" between old 8th and new 4th); Bagneris Test., 7/21/94 p.m. Tr. 117, J.A. 93-94; Copelin Test., House Comm. Tr. 46, J.A. 142.

version enacted in 1971 which started at the Texas border but extended all the way to Lake Pontchartrain in the southeast.

The district court declared the State's historical district configurations legally irrelevant because they had never been ruled constitutional in court challenges.[25] Imposing such a requirement was improper. Federal courts are obligated to treat unchallenged state enactments as presumptively valid, not presumptively unconstitutional. *See generally Voinovich v. Quilter*, 113 S. Ct. at 1156-57. Even if, as the district court concluded (J.S. App. 4, 16), political considerations motivated the Louisiana Legislature in drawing its prior plans, such political considerations, standing alone, do not raise constitutional concerns or provide an excuse for ignoring the state's redistricting history. *Gaffney v. Cummings*, 412 U.S. 735, 752-53 & n.18 (1973).

More importantly, however, the district court simply failed to understand the relevance of District 4's resemblance to prior configurations. This Court was clearly concerned about the impact of districts that bespeak segregation on their face. When a majority-black district resembles, in configuration, previous majority-white districts, it is simply illogical to conclude that the shape of the majority-black district is explicable, on its face, solely as an effort to segregate voters by race. Not only is the general visual resemblance to previous white-majority districts highly relevant in itself, but the use of the cores of older districts as a base for the 4th District indicates a previous political commonality which enhances the reasonableness of the district. The district, in addition, can rationally be understood as a district generally centered on

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[25]The court stated that the configuration of the old 8th Congressional District should be disregarded because the old 8th was "certainly bizarre," was enacted "before *Shaw*," and was "never challenged." J.S. App. 4. *See also* J.S. App. 16 (holding that "the tradition of the past regarding the old eighth district" is not "binding on this Court, due to the fact that the old eighth district was never challenged on constitutionality by any court [sic] in the United States.") (Shaw, D.J., joined by Wiener, J., concurring). As Judges Shaw and Wiener saw it, "what was done by the Louisiana Legislature in the old eighth has no application to this case before this Court." *Id.*

the Red River and Mississippi River, highly significant geographical features in Louisiana which also were prominent in prior versions of the old 8th.[26]

A comparative standard — that is, a standard which requires plaintiffs alleging a *Shaw* claim to demonstrate that the challenged majority-black district departs dramatically from the state's prior redistricting practices — has further benefits which the district court improperly disregarded. A comparative standard certainly satisfies intuitive concepts of fairness and equal treatment. There is little reason for citizens to feel that a plan unfairly penalizes anyone on account of race if the challenged district is not materially stranger in shape than other white-majority districts the state has drawn. Indeed, if Louisiana law provided that configurations such as the old 8th District may be used only for white-majority districts, and not for black-majority districts, that law would clearly be unconstitutional. The decision below would read *Shaw* to impose just such a discriminatory result.

A comparative standard also helps to reduce the role of subjective federal court assessments of district shape by employing a standard based on the state's own presumptively valid policy choices in drawing other districts. In this case, the district court failed to adopt any objective standard for determining when a district should be considered "bizarre." The arbitrariness of the court's approach is revealed most clearly simply by comparing the court's 1993 decision striking down Louisiana's first plan, Act 42, with its 1994 decision striking down Act 1. In its 1993 decision, the district court found that the "evidence . . . undeniably established" that "a second majority black district could have been drawn that would have done *substantially* less violence to traditional redistricting principles." J.S. App. 86 (emphasis added); *see*

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[26]Hilliard Test. 7/21/94 p.m. Tr. 90, J.A. 85 ("the two things that attracted me most to Act One is the way the Florida parishes were treated and also the recognition of what I call the Red River corridor and those seem to me to reflect . . . the twentieth century and modern, what I would call functional regions, economic section"); *id.* at Tr. 49, J.A. 76 (District 4 recognizes "very important" region of state); *see also* n. 8, *supra*.

*also id.* at 86-87 (noting that *plaintiffs'* expert testified that "a plan could be devised that would include a second black majority district, yet still be *significantly* more compact and comport *much more closely* with other traditional redistricting principles") (emphasis added). The plaintiffs themselves also expressly conceded this in their first Motion to Affirm. Motion to Affirm, April 1994, at 20. Nevertheless, when Louisiana drew precisely such a plan — dramatically increasing District 4's compactness, following major geographical features and historical district configurations, and eliminating any possible suggestion that the district is unduly "packed" with black voters — the district court nevertheless declared the new district "bizarre" as well and replaced it with its own preferred plan.[27] The court was simply dissatisfied that Louisiana still had not drawn a congressional redistricting plan reflecting the court's own preferences.

Such arbitrary decisionmaking has no place when federal courts address the sensitive area of legislatively drawn redistricting plans. The costs of licensing subjective and onerous court-created requirements in this arena are high. Litigation over the validity of a state's redistricting plan throws a state's entire system of securing elected representation into uncertainty and disarray.[28] Partisan and other interest groups that may be dissatisfied with the legislature's redistricting decisions have every incentive to resort to the courts under any available legal theory, particularly in light of the strict limits this Court has placed on direct claims of political gerrymandering. These considerations all counsel

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[27]The result is even more remarkable given that the plaintiffs elected not to present any testimony that Act 1 fails to satisfy reasonable redistricting criteria.

[28]For example, because of the litigation over Louisiana's congressional districts last summer, the state's candidate qualifying period commenced before the public and potential candidates knew how the districts would be configured. Candidate qualifying began on August 10, 1994, after the district court had imposed its own redistricting plan. After a day of candidate qualifying under that court-drawn plan, this Court issued its stay on August 11, reinstating the State's plan. Candidate qualifying then had to be started anew. Only 5 days elapsed between the date when the boundaries were settled through this Court's stay order of August 11 and the close of the court-ordered candidate qualifying deadline on August 16.

against the district court's enthusiastic embrace of a standard which measures "bizarreness" by reference to the court's own view of an optimal redistricting plan rather than to the state's own traditional redistricting practices.

2. The District Court Erred in Imposing the Court's Own Subjective Preferences as Constitutional Requirements.

While ignoring District 4's resemblance to previous districts drawn by the Legislature, the district court objected to several specific features of District 4. These objections fail to provide a principled basis for subjecting Louisiana's redistricting plan to strict scrutiny, because they either measure Act 1 against a standard of maximum possible compactness — a standard not imposed by *Shaw* — or reflect subjective preferences that have no force under *Shaw.*

The court indicated that District 4 was "bizarre" and constitutionally suspect under *Shaw* because it is approximately 250 miles long and not sufficiently compact. Long districts, however, are not unusual in Louisiana. Even when Louisiana had eight rather than seven congressional districts, and therefore could have constructed smaller districts, the old 8th District ranged between 210 and 240 miles in length at various times.[29] U.S. Ex. 8 at Table I. Currently, because a large proportion of Louisiana's population is concentrated in the New Orleans area, congressional districts outside of that area have to include geographically dispersed populations in order to create seven equipopulous districts.[30]

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[29]Thus, in Louisiana, long before District 4 was enacted, persons residing long distances apart were deemed to have "'residential patterns afford[ing] [them] the opportunity'" of being joined in the same district: *e.g.*, persons in northwest Louisiana, on the Texas border, were joined in the same district with persons living near Lake Pontchartrain. *Cf. Shaw*, 113 S.Ct. at 2832, quoting *United Jewish Organizations v. Carey*, 430 U.S. 144, 167-68 (1977) (White, J., joined by Stevens and Rehnquist, JJ.).

[30]The district court's remedial plan itself illustrates this point. For example, that plan would join Beauregard and part of Allen Parish in south Louisiana with Shreveport in northwest Louisiana. *See* map, J.S. App. 36 (District 4 ). Under Act 1, those parishes now are included in a more compact southwest

Chief Judge Shaw attempted to support the conclusion of "bizarreness" by offering a colorful description of District 4 ("appears as if someone knocked over an inkwell," J.S.App. 13). But it is not difficult to invent equally colorful descriptions of congressional districts drawn by many states.[31] If the ability to describe a district in fanciful terms is sufficient to define a "bizarre"

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Louisiana district (District 7). From the point of view of residents of Beauregard and Allen parishes, therefore, the district court's remedial plan may be more "bizarre" than Act 1. In fact, in the court's remedial plan, *the plaintiffs themselves* would reside in a large district including 20 parishes, five *more* parishes than are now included in plaintiffs' district under Act 1.

[31]The following is a sampling of descriptions of various majority white districts taken from one reference work, *Congressional Quarterly's Politics in America 1994: The 103rd Congress* (P. Duncan, ed., 1994).

*District 4, Massachusetts (94% white):* "The contorted shape of the 4th is proof positive that the state where the term gerrymander was coined remains true to its tradition .... [The district lines] roughly trace the shape of a saxophone" (*id.* at 726).

*District 5, Oregon (94% white):* "Oregon's four major industries — timber, agriculture, fishing and tourism — are all represented in the 5th, whose shape bears a passing resemblance to that of the state fish, the chinook salmon" (*id.* at 1277).

*District 9, Washington (85% white):* "The new 9th strings together an array of communities without much sense of commonality .... The district's "Main Street" is a 60-mile stretch of Interstate 5 .... One local political consultant called the 9th 'an entire district with nothing at its heart but Chuck E. Cheeses'" (*id.* at 1635).

*District 4, Tennessee (96% white):* "[T]he 4th is a long, sprawling district, extending nearly 300 miles .... [F]rom east to west it touches four states — Mississippi, Alabama, Kentucky and Virginia" (*id.* at 1418).

*District 12, New Jersey (90% white):* "Reaching from the Delaware River, on its western border, almost to the Atlantic Ocean, the 12th meanders across New Jersey's midsection" (*id.* at 992).

*District 3, Massachusetts (94% white):* "Political wags dubbed the snake-like 3rd the 'Ivy League' district because it stretches from the town of Princeton in central Massachusetts to Dartmouth on the southeastern coast. (The schools by those names are located elsewhere.)" (*id.*.at 724)

*District 13, Ohio (94% white):* "The district centers around two distinct sets of communities .... The Ohio Turnpike is all that connects the two". (*id.* at 1210)

district subject to strict scrutiny, few states are likely to escape constitutional challenges to their redistricting plans under *Shaw*.

Plaintiffs incorrectly rely upon blow-up maps showing irregular lines in some individual parishes. The focus on isolated portions of the district is misplaced. If any district is blown up large enough, the vicissitudes of precinct lines, census geography, and the like will make it look odd. The standard under *Shaw* is whether the plan *as a whole* is so bizarre and irregular that on its face it could have no explanation other than race, not whether an isolated *portion* of a district in a plan has irregular lines — a test that few states could satisfy. Furthermore, uncontradicted testimony demonstrated that some of the irregularities in district lines in Act 1 reflected non-racial factors such as the shape of precinct lines or adjustments made in response to political concerns of incumbents.[32]

The district court further objected to District 4 for splitting too many parishes. But Louisiana does not have any constitutional provision forbidding parish or city splits, as do some states, and the legislature has split parishes and cities for a variety of

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*District 11, Virginia (81% white):* "The 11th [has] a shape that vaguely recalls the human digestive tract". (*id.* at 1602)

Official U.S. Census maps of these and other majority-white congressional districts in various states are attached in the Appendix to this Brief. As the maps indicate, many states have elected to depart from standards of maximum compactness in drawing congressional districts, underscoring the breadth of the district court's approach to determining "bizarreness."

[32]Precinct lines themselves, which were followed in drawing the districts, often have irregular shapes in Louisiana. Koepp Test. 7/21/94 a.m. Tr. 29-30, J.A. 47; Brinkhaus Test., 7/22/94 a.m. Tr. 9, J.A. 105-06. Some adjustments that were made to satisfy political concerns of the incumbents caused irregularities in some areas. Koepp Test., 7/21/94 a.m. Tr. 47-48, J.A. 54-55; Bagneris Test., 7/21/94 p.m., Tr. 119, J.A. 94. Irregularities in natural geographic boundaries also affected the district shape. As Koepp testified: "[O]ne of the things that the legislators talked about in the committee testimony, if you're drawing a plan of Kansas, you can make nice square districts because Kansas is as square as it can be .... In Louisiana there are very few ... straight lines. We've got rivers and streams, bayous, lakes, even the outside boundary of our state is very in and out

purposes.[33] The plaintiffs concede that "there is no magic number of allowed split parishes" (Motion to Affirm at 17). Act 42, struck down by the court in 1993, split 28 Louisiana parishes. Act 1, as redrawn by the Legislature, has only 14 split parishes. Plans offered during the 1994 special legislative session split anywhere from five to 21 parishes. House Comm. Tr. 41. Louisiana's redistricting plan in the 1980s divided seven parishes. The district court's remedial plan splits six, including some that are not currently split under Act 1. The splitting of parishes and cities under Act 1 is not so extraordinary as to make the plan constitutionally suspect.

The district court also criticized the 4th District because it includes members of different ethnic and religious groups ("District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles"), and mixes together different agricultural crops: "cotton, soybean, rice, sugar cane, and timber." J.S. App. 15-16 (Shaw, C.J., concurring, joined by Wiener, J); *see also* J.S. App. 66 (*Hays I*). But the separation of different crops and religious groups into distinct districts is not a required or even feasible redistricting principle.[34] Undisputed testimony at trial established that it is not possible to draw *any* congressional districting plan in Louisiana which does not combine different religious groups, different crops, and dif-

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. . . So that played a part in some of the looks." Koepp Test., 7/21/94 a.m. Tr. 29-30, J.A. 47.

[33]New Orleans was split between different congressional districts long before the advent of one-person, one-vote requirements, U.S. Ex. 4., and Baton Rouge has been split since the 1980's. Moreover, the Red River, which District 4 generally follows, splits most of the parishes it crosses. Hilliard Test. 7/21/94 p.m. Tr. 48, J.A. 75.

[34]In the view of the district court, a homogeneous English-Scotch-Irish district would appropriately recognize a community of interest, while a predominantly black district would be "segregated"; blacks placed in a predominantly white district would be laudably "integrated", but Protestants in a predominantly Catholic district would be unfairly disadvantaged by the disregard of their "unique identity, interests, culture and history." J.S. App. 15-16 (Shaw, C.J., con-

ferent industries. Hilliard Test., 7/21/94 p.m. Tr. 36, J.A. 71.[35] Indeed, a Louisiana geographer who reviewed all of the proposed redistricting plans introduced in the 1994 Special Session testified that *no other* proposed congressional plan — whether containing two majority-black districts or only one — achieved a better correspondence with Louisiana's traditional regions than did Act 1. Hilliard Test., 7/21/94 p.m. Tr. 84-85, J.A. 84. The district court clearly erred in relying on subjective preferences for a different regional treatment as a basis for declaring Act 1 "bizarre."[36]

This Court's constitutional jurisprudence must permit a proper balance between state responsibility and federal court oversight, one which acknowledges that state legislatures are entitled to reasonable deference in balancing the commands of the Constitution, the Voting Rights Act, and the state's own political interests in redistricting. Act 1 is a sound and reasonable redistricting plan which successfully balances the myriad factors relevant to congressional redistricting, while creating a second majority-black district which does not depart dramatically from the configurations the State has used for previous white-majority districts. The district court erred in holding that a legislatively en-

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curring, joined by Wiener, J.). Such a skewed interpretation of the Fourteenth Amendment cannot be reconciled with this Court's decision in *Shaw*.

[35]The old 8th District as it existed during the 1980's has been described in precisely the same terms which the district court used to criticize District 4 — as a mixture of different regions of the state. "In some ways, the 8th is a microcosm of Louisiana. It starts in the piney woods of the north, moves southeast through Cajun country, crosses the Mississippi River and ends up on the outskirts of metropolitan New Orleans." *See Congressional Quarterly's Politics in America 1990: The 101st Congress* (P. Duncan, ed.), at 629.

[36]North Louisiana lost population between 1980 and 1990 and the State had determined that the area no longer supported two districts. Koepp Test. 7/21/94 a.m. Tr. 10-11, J.A. 36-37. The plaintiffs, who reside in North Louisiana, may be unhappy with this policy choice (for example, a plan submitted by State Senator Thompson, which was designed to permit North Louisiana to dominate two districts and would put current Representative Billy Tauzin "out of a job", had input from the plaintiffs, *see* Senate Comm. Tr. 42, J.A.151). But *Shaw* does not establish a right for plaintiffs to have two districts dominated by North Louisiana.

acted redistricting plan meeting all these criteria is presumed to be illegal.

## II. THE DISTRICT COURT ERRED IN DISMISSING AS INADEQUATE ALL OF THE COMPELLING STATE INTERESTS SUPPORTING ACT 1 AND IN REQUIRING THE STATE TO PROVE AN ACTUAL VIOLATION OF FEDERAL LAW AS A PREDICATE FOR DRAWING A MAJORITY-BLACK DISTRICT.

Louisiana demonstrated that the inclusion of two black-majority districts in Act 1 was narrowly tailored to further its compelling interest in complying with the Voting Rights Act and in assuring that racially polarized voting patterns do not exclude the State's black citizens from equal access to the political process. The court below seriously misconstrued this Court's precedents in dismissing all of these compelling interests as inadequate, even assuming that the district court correctly applied *Shaw* in holding that strict scrutiny of Act 1 was required. The court further erred by relieving plaintiffs of their ultimate burden of demonstrating Act 1's unconstitutionality.

### A. Act I Is Supported by Compelling State Interests

In *Shaw v. Reno*, this Court noted that the existence and extent of racial bloc voting and minority political cohesion are directly relevant in assessing whether a state is justified in drawing majority-minority districts. 113 S.Ct. at 2830. *See also Johnson v. De Grandy*, 114 S.Ct. 2647, 2661 (1994) (noting that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity"). Remarkably, the district court's opinion failed even to discuss the evidence showing the extent and significance of racially polarized voting in Louisiana.

In Louisiana, whose population is 30% black, no black candidate has been elected to any statewide office in this century, and no black candidate in this century has won election either to Congress or to the Louisiana Legislature from a district where whites comprise a majority of the registered voters. Engstrom Report, State Ex. 13, J.A. 188; *see Major v. Treen*, 574 F. Supp. at 341.

Statistical analyses of voting patterns demonstrate indisputably that voting in Louisiana elections, including congressional elections, is severely polarized along racial lines; black voters cohesively support black candidates, but are consistently unable to elect them to office in white-majority districts because of white bloc voting for white candidates. Engstrom Report, State Ex. 13, J.A. 181-93.[37] On that very basis, a federal court in 1983 struck down Louisiana's congressional redistricting plan because the legislature had refused to enact a plan creating a majority-black district in the New Orleans area.[38] It is difficult to imagine a

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[37]For example, from 1986 through 1990, black candidates ran on five occasions in old District 8, the white-majority congressional district having the greatest concentration of black voters (35% black). Black voters in these elections strongly supported black candidates, but each time the black candidate was defeated by the white bloc vote for white candidates. On average, the black candidates in these elections received 87.5% of the black vote but only 9.3% of the white vote. State Ex. 15. The racial breakdown in these election results is as follows:

| | *% of black voters for black cand.* | *% of white voters for black cand.* |
|---|---|---|
| 1990 Primary | 84.7% | 3.2% |
| 1988 Primary | 91.0% | 3.3% |
| 1988 Runoff | 96.7% | 14.9% |
| 1986 Primary | 68.3% | 3.3% |
| 1986 Runoff | 97.0% | 21.6% |

Moreover, despite constituting over 35% of the voters in District 8 during the 1980's, black voters exercised little influence over their representative. The representative consistently "ranked last among the State's delegation in support for civil rights measures." Engstrom Report, U.S. Ex. 13, J. A. 187. Even plaintiffs' expert described the District 8 representative as "unresponsive" to black voters. Weber Test., Tr. 281, 1993. Further, in the most recent state legislative races between black candidates and white candidates, black candidates received on average 86.3% of the black vote and a mere 7.2% of the white vote. *Id.* Additional statistical analyses establishing racially polarized voting patterns in Louisiana were introduced at the 1993 trial. *See* State Exs. 4-15 (1993 Trial).

[38]*Major v. Treen*, 574 F. Supp. at 352-55. Numerous other court decisions have likewise found that voting patterns are racially polarized in Louisiana. *See*

stronger record supporting the conclusion that a majority-black district is necessary "to ensure equal political and electoral opportunity" for black voters. *Johnson*, 114 S.Ct. at 2661.[39]

1. Louisiana Has a Compelling Interest in Complying with the Voting Rights Act.

In *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), this Court held that a state actor may take race-conscious action to assure compliance with federal law when "there is sufficient evidence to justify the conclusion that there has been prior discrimination." 476 U.S. at 277 (plurality opinion); *id.* at 292-93 (O'Connor, J., concurring in part and concurring in judgment). The district court, however, applied a different standard, ruling that the requisite basis for remedial action "may be drawn from judicial, legislative, or administrative *findings of constitutional or statutory violations*." J.S. App. 6 (emphasis added). Concluding that the evidence at trial did not establish an actual violation of the Voting Rights Act, and thus did not "*compel*" remedial action by Louisiana, the district court ruled that Louisiana had no compelling interest which justified Act 1. J.S. App. 8 (emphasis added).

The district court misapplied the governing law. A court is *not* required to "make an actual finding of prior discrimination based on the [state actor's] proof" before race-conscious action will be upheld. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part

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McCrary Report, U.S. Ex. 9, J.A. 216-17. *Major v. Treen* also found that Louisiana has a lengthy history of racial discrimination, a finding echoed in numerous court decisions. *Id.* at 339-40; *see* McCrary Report, U.S. Ex. 9, J.A. 205-219. Several of these decisions also note the continuing use of racial appeals in election campaigns in Louisiana. *E.g.*, *Clark v. Roemer*, 777 F. Supp. 445, 458 (M.D. La. 1990), reaffirmed, 777 F. Supp. 471 (M.D. La. 1991).

[39]The complete absence of black electoral success in congressional or legislative districts with white registered voter majorities reflects "'the inexorable zero'" which, under this Court's precedents, most strongly justifies corrective state action. *See Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (O'Connor, J., concurring in the judgment) (*quoting Teamsters v. United States*, 431 U.S. 324, 342 n.23. (1977)).

and concurring in judgment). Instead, remedial action is permissible as long as the state actor has "a firm basis for concluding that remedial action [is] appropriate." *Id.* at 293. In the context of race-conscious employment and contracting decisions, the Court has held that a "firm basis" exists when a state reasonably believes that its failure to take such measures would support a *prima facie* case of a constitutional or statutory violation. *Id.* at 292; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (majority opinion). The evidence adduced by Louisiana was more than adequate to show a firm basis in fact for believing that adoption of Act 1 was justified to assure compliance with Sections 2 and 5 of the Voting Rights Act.

*a. Section 2.* As *Major v. Treen* instructs, "[A]mended Section 2, Congress' response to the continuing concern over the extent of minority participation in the electoral process, provides a formidable vehicle for redressing vote dilution claims." 574 F. Supp. at 350. *See also Voinovich v. Quilter*, 113 S.Ct. at 511 ("Section 2 . . . prohibits any practice or procedure that, 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters"), *quoting Thornburg v. Gingles*, 478 U.S. at 47.

The evidence unquestionably demonstrates that black voters in Louisiana are politically cohesive and are generally unable, because of white bloc voting against black candidates, to elect candidates of their choice in white-majority districts, facts which demonstrate two key elements of a *prima facie* Section 2 claim under *Thornburg v. Gingles*, 478 U.S. at 51. In addition, the Red River and Mississippi River areas that overlap with the Louisiana's old 8th Congressional District contain sufficient concentrations of black voters to comprise a majority in a district, satisfying the remaining *Gingles* precondition which requires that the minority group be sufficiently large and geographically compact to comprise a majority in a single-member district. 478 U.S. at 50.

The district court ruled that Section 2 provided no support for Louisiana's decision to adopt Act 1 solely because the court deemed District 4 insufficiently compact to make a *prima facie*

showing under *Gingles*. J.S. App. 7-8. The district court's interpretation of this *Gingles* factor is erroneous. A district satisfies the *Gingles* threshold standard if it is reasonably consistent with the state's traditional redistricting principles. Indeed, in 1991, this Court summarily affirmed the ruling in *Jeffers v. Clinton*, which held that proposed majority-black legislative districts, although somewhat irregular in configuration, satisfied the *Gingles* threshold standard because they were "not materially stranger in shape" than other legislatively drawn districts. 730 F. Supp. at 207, *aff'd mem.*, 498 U.S. 1019 (1991).[40]

The district court's ruling is also based on an insupportable factual assertion. The opinion states, without citation to the record, that "the State's own expert confirmed that Louisiana's minority population is simply not sufficiently concentrated to meet *Gingles* minimum requirements." J.S. App. 8 n.4. With all respect to the district court, the record reflects the opposite: the state's demographer, Glenn Koepp, testified that District 4 *is* reasonably compact. See Koepp Test. 7/22/94 a.m. Tr. 84, J.A. 127; *id.*, Tr. 81-86, J.A. 125-128. Plaintiffs submitted no contrary testimony.[41]

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[40]*See also Cane v. Worcester County*, 35 F.3d at 926-27 n.6 (proposed district acceptable under *Gingles*, despite irregularities in shape, because it is "similar in appearance to one of the former residency districts"); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1053 (D.Md. 1994) (three-judge court) (comparing configuration of proposed majority-black district to configuration of majority-white districts in determining that district satisfied *Gingles* standard); *Clark v. Calhoun County*, 21 F.3d 92, 95-96 & n.2 (5th Cir. 1994) (districts need not conform to absolute standard of compactness to meet burden under *Gingles*); *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) (same); *Neal v. Coleburn*, 689 F. Supp. 1426, 1437 (E.D. Va. 1986) (same). *See also* Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J. L. & Politics 345, 389 (1992) (endorsing a functional, comparative approach for determining if proposed majority-minority district is sufficiently compact).

[41]In fact, Act 1 is more compact than the proposed congressional redistricting plan prepared by plaintiffs' expert, which plaintiffs submitted to the district court as a remedial alternative in 1992. *See* Pl. Ex. 14 (1992 trial) (introduced as U.S. Ex. 14 in 1994 trial).

Here, as explained in Part I.B., *supra*, District 4 is configured in a manner similar to past versions of the old 8th Congressional District, which was majority-white in population. With a record leaving no doubt whatsoever concerning the other two *Gingles* factors, and a proposed majority-black district that appears "not materially stranger in shape" than districts previously drawn by the State, the Legislature had ample reason to believe that its congressional plan would be vulnerable to a Section 2 vote dilution challenge if it had refused to create a second majority-black district.

This Court, by rejecting the requirement of proving an actual statutory violation as a predicate for race-conscious remedial action, has recognized that states are "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent . . . discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in judgment) (emphasis in original). Between these two extremes, some breathing room for states is required, permitting them to take remedial action without awaiting the final convergence of all facts constituting unassailable proof of a Section 2 violation. *See id.* at 290 (O'Connor, J., concurring in part and concurring in judgment) (recognizing "'the value of voluntary efforts to further the objectives of the law,'" quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, at 364 (opinion of Brennan, White, Marshall and Blackmun, JJ.)). The district court ignored these important concerns in holding that compliance with Section 2 was not an important state interest supporting Act 1.

*b.* Section 5. Louisiana is one of the nine states which is covered in whole by Section 5 of the Voting Rights Act, which requires designated states or local governmental units to obtain administrative or judicial preclearance of all changes in election practices, including redistricting plans. Section 5 coverage is predicated on congressional findings of discrimination in the designated states. *See, e.g., McCain v. Lybrand*, 465 U.S. 236, 244-45 (1984) (noting Section 5 coverage is based on findings that a

state has "engaged in certain violations of the Fifteenth Amendment").[42]

The district court emphasized that adoption of a Louisiana congressional plan containing only one majority-black district would not violate the discriminatory-effect test of Section 5 because it would not cause a retrogression of minority voting strength under *Beer v. United States*, 425 U.S. 130 (1976). J.S. App. 17-18 (opinion of Shaw, C.J., joined by Wiener, J.); J.S. App. 54 n.21 (*Hays I*). But the absence of a retrogressive effect satisfies only one of the two requirements for Section 5 preclearance; states must also demonstrate the absence of any racially discriminatory purpose to secure preclearance of their proposed enactments. *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975); *McCain v. Lybrand*, 465 U.S. at 247. The relevant case law, which the district court disregarded, establishes that the "purpose" prong of Section 5 may result in denial of preclearance even when the proposed redistricting plan is clearly non-retrogressive.[43]

If Louisiana had refused to adopt a plan containing two majority-black districts on grounds of an alleged state policy requir-

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[42]The states are Alabama, Alaska, Arizona, Louisiana, Georgia, Mississippi, South Carolina, Texas, and Virginia. Parts of seven other states are also covered by Section 5. 28 C.F.R. Part 51, Appendix. When Congress last extended Section 5 in 1982, it rejected efforts to make coverage nationwide, citing the "extensive Congressional findings of voting discrimination in the covered jurisdictions" which grounded the special remedies provided in Section 5. *See* S. Rep. 97-417, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 192.

[43]*See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983) (affirming denial of preclearance for congressional redistricting plan, despite absence of retrogressive effect, where state had refused to draw a district with a 60% black population while drawing districts to protect the interests of overwhelmingly white constituencies). *See also City of Pleasant Grove v. United States* 479 U.S. 462 (1987) (Section 5 preclearance denied where state had refused to annex black areas, while attempting to annex vacant land where white population was likely to locate); *City of Richmond v. United States*, 422 U.S. 358, 372, 378-79 (1975).

ing highly compact congressional districts, such an explanation would have been viewed as suspect and pretextual in light of the configurations Louisiana has previously employed for the old majority-white 8th District. Indeed, Louisiana drew its congressional redistricting plan in the wake of determinations by the United States Attorney General that Louisiana's statewide redistricting efforts in 1991 for the Board of Elementary and Secondary Education and the State Senate were infected with a racially discriminatory purpose. The record, in sum, shows a "firm basis" for Louisiana's belief that Act 1 was justified as a reasonable effort to assure compliance with Section 5. *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in judgment).

The district court acknowledged that Louisiana had an actual belief that the State's refusal to create a second majority-black district would prevent preclearance of its redistricting plan. J.S. App. 7 n.3. The district court nevertheless criticized Louisiana for not choosing to await the denial of preclearance for a plan with only one majority-black district and then file a declaratory judgment action seeking judicial preclearance in the District of Columbia. *Id.* The court's reprimand rings strange indeed. For years, Louisiana has been criticized for excessive resistance to federal civil rights requirements. Surely, the Fourteenth Amendment does not now require Louisiana to display the maximum possible defiance of the federal executive branch as a condition for upholding the constitutionality of its legislatively enacted redistricting plans. Such a requirement, in any event, would run afoul of the rule that a state need not await a judicial finding that it has violated federal law before it may take race-conscious action designed to avoid a violation. *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277.[44]

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[44]In making a *de novo* review of the correctness of the Attorney General's interpretation of Section 5, and concluding that the Attorney General had no basis to object, the district court also overstepped its jurisdiction. Jurisdiction over Section 5 preclearance determinations is reserved to the United States District Court for the District of Columbia. *United States v. Board of Supervisors*, 429 U.S. 642, 645 (1977); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971).

2. Louisiana Has a Compelling Interest in Ameliorating The Effects of Severely Racially Polarized Voting and Overcoming Past Discrimination.

The creation of a second majority-black congressional district was also fully justified as a means to overcome Louisiana's history of racial discrimination and the patterns of racially polarized voting in Louisiana which have excluded African-American political representation in majority-white election districts. The exclusion of minority representation that results from racially polarized voting patterns has serious consequences. It communicates to minority citizens that they are less than full participants in democratic government, and that the election of their preferred representatives will be persistently frustrated by voting habits that may reflect nothing more than racial prejudice.[45]

In a state where severe racially polarized voting prevails, the consequences of drawing only white-majority districts are well understood. States, of course, cannot directly regulate the behavior of their citizens in the voting booth. But in drawing district lines to avoid the political exclusion of minorities that accompanies racial bloc voting, a state may reasonably seek to moderate the impact of racially polarized voting on the election process. This is a wholly appropriate role for states and by no means depends upon vague notions of "societal discrimination" — at least not in a state where there exists strong evidence of racial voting patterns and prior state-sponsored discrimination. *See UJO v. Carey*, U.S. 430 at 167 (a State is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls") (White, J., joined by Stevens, J. and Rehnquist, J.); *Croson*, 488 U.S. at 509 (opinion of O'Connor, J.)

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[45]"The focus on polarized voting in [the Supreme Court's] cases addresses the central underlying concern of political legitimacy . . . . In the context of persistent racially polarized voting, the problem is not simply that some win and some lose. Rather, there is a predictability to who wins and loses, and that predictability falls along racial lines." *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich L. Rev. 1833, 1860 (June 1992).

("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a [state or] local government's determination that broader remedial relief is justified"; *see also id.* at 491 (O'Connor, J.); *cf. Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982) (lack of black electoral success because of racial bloc voting "bear[s] heavily on the issue of purposeful discrimination") (finding Fourteenth Amendment violation).

B. Act 1 is Narrowly Tailored

The district court failed to analyze whether Act 1 met the requirement of narrow tailoring. Act 1 clearly satisfies that requirement, even under the standards in the district court's own 1993 opinion in this case. J.S. App. at 80-88. District 4 in Act 1, with only a 54% black voting age population, does not unnecessarily "pack" black voters and does not ensure the election of a black candidate. Engstrom Report, State Ex. 13, J.A. 181, 192. It merely ensures that black voters will have a reasonable opportunity to elect a candidate of their choice. The plan does not unduly trammel the interests of white voters, who remain fairly represented in relation to their numbers in the state's population and are free to participate in congressional elections and to seek office in all congressional districts. *Cf. Croson*, 488 U.S. at 509 (nonminority contractors completely excluded from competing for fixed percentage of contracts); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (nonminorities completely excluded from participating for 16 of 100 slots in medical school class).[46] Act 1 creates two districts that allow black voters a measure of electoral opportunity while also giving reasonable weight to other redistricting criteria. *See Bakke*, 438 U.S. at 317-19

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[46] *See id.* at 305 (Powell, J.) (creation of majority-minority districts as remedial measure "improve[s] the previously disadvantaged group's ability to participate without excluding individuals belonging to any other group from enjoyment of the relevant opportunity — meaningful participation in the electoral process"). *Cf. Johnson v. De Grandy*, 114 S.Ct. at 2658 n.11 (noting that creation of majority-minority election districts does not guarantee proportional minority representation, but instead provides political opportunity to minority voters).

(Powell, J.) (use of race as a factor in medical school admission does not violate Fourteenth Amendment). *See generally Shaw v. Hunt*, 861 F. Supp. at 444-56 (discussing application of narrow tailoring requirement to race-conscious redistricting plans).

C. Plaintiffs Failed to Sustain Their Burden of Proof

The district court improperly relieved plaintiffs of the burden of proving the absence of a compelling state purpose supporting Act 1. The State was required to put on its proof, and judgment was granted to plaintiffs, before the plaintiffs called a single witness to meet their burden of proving Act 1's unconstitutionality.[47] After the State produced its evidence indicating a firm basis for belief that remedial action was required, the plaintiffs produced *no* evidence to carry their ultimate burden of overcoming the State's showing of a remedial purpose. Nevertheless, the district court granted judgment to plaintiffs because, in its view, "[d]efendants have proved no compelling governmental interest" sufficient to support Act 1. J.S. App. 6 .

Such burden-shifting is contrary to this Court's precedents. The plaintiffs in a reverse-discrimination case, like other plaintiffs, "continue to bear the ultimate burden of persuading the court that the [State's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'" *Wygant*, 476 U.S. at 293 (O'Connor, J., concur-

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[47]Extraordinary procedural irregularities characterized the proceedings below. The district court improperly ordered trial on the merits to commence, and entered judgment, before the time had elapsed for this Court to send down its judgment following its decision. *See* S. Ct. R. 45. This schedule did not permit the State a reasonable opportunity to conduct discovery and prepare for trial. Since the court below perceived plaintiff-appellees' burden as merely the presentation of a map depicting the congressional district boundaries, this rush to trial worked to the severe disadvantage of the State. In similar contexts, circuit courts have routinely found an abuse of discretion where a district court prevented a party from properly preparing for trial on the merits. *See, e.g., Gellman v. Maryland*, 538 F.2d 603, 606 (4th Cir. 1976); *Proimos v. Fair Automotive Repair, Inc.*, 808 F.2d 1273, 1278 (7th Cir. 1987) (Easterbrook, J.).

ring in part and concurring in judgment). "Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the [State's] remedial action based on the statistical evidence was justified." *Id.* at 293. *See also Johnson v. Transportation Agency*, 480 U.S. 616, 626-27 (1987).

## III. THE PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF ACT 1 UNDER *SHAW V. RENO*.

None of the four plaintiffs lives in the 4th Congressional District. Instead, each resides in Lincoln Parish, which is located in the heart of District 5, a compact, predominantly white district created by Act 1. Plaintiffs' amended complaint alleged that Districts 4 and 6 under Act 1 are noncompact and racially segregated, but did not so allege as to District 5 (First Amended Petition at ¶¶20-21). Despite the State's challenge to plaintiffs' standing,[48] none of the plaintiffs testified as to any injury in fact they have suffered from Act 1, nor of any possible personal benefit they would derive from a favorable decision. Indeed, under the plan which the three-judge court ordered into effect to replace Act 1, Lincoln Parish would be placed in a geographically *larger*, but still predominantly white, district. J.S. App. 36 (District 5).

The conclusion is inescapable that the plaintiffs lack standing to challenge Act 1 under *Shaw*, and that the federal court consequently lacked jurisdiction to invalidate Louisiana's congressional redistricting plan. Art. III, U.S. Const. As this Court has repeatedly held, a plaintiff must meet several requirements to demonstrate standing to sue: (1) a concrete and particularized injury in fact, (2) a causal connection between the challenged conduct and the alleged injury in fact; and (3) a likelihood — not merely a speculative possibility — that the proven injury will be

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[48]The State questioned plaintiffs' standing in a written motion. Motion to Dismiss at 2 (filed July 21, 1994). The State also introduced evidence at trial proving that none of the plaintiffs resides in District 4, State Ex. 22, and argued at trial that plaintiffs had demonstrated no cognizable injury. Tr. 7/22/94 p.m. Tr. 38.

remedied by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992); *see also, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). In *Lujan*, this Court made clear that, where standing is questioned, a plaintiff is required to demonstrate with probative evidence each of the circumstances necessary for standing. 112 S.Ct. at 2136-37.

In *Shaw*, this Court suggested (but did not explicitly decide) that voters seeking to challenge "bizarre" race-based districting in a particular case might be sufficiently harmed to have standing if the challenged plan prompted their representative to represent only a racial group to which plaintiffs did not belong, or had other harmful racial consequences. 113 S. Ct. at 2827. But under *Shaw*, as in any other case, plaintiffs must produce proof that *they* have suffered such injuries in order to establish standing. *Lujan*, 112 S.Ct. at 2136-37. Plaintiffs' status as non-residents of the districts to which they object precludes any such claim. Indeed, plaintiffs have not established or even alleged that the invalidation of Act 1 would have any material effect on either the compactness or the racial demographics of the district in which they themselves reside. While such evidence *alone* would not suffice to meet Article III standing requirements, it is without doubt a *necessary* element of plaintiffs' proof of standing.[49]

In this Court, plaintiffs' Motion to Affirm argues that standing exists because certain of the plaintiffs are generally opposed to "racial polarization." Motion to Affirm at 3. Under *Allen v. Wright*, 468 U.S. 737 (1984), and a host of other standing precedents, such allegations are insufficient to establish standing. *Allen v. Wright* held that black plaintiffs could not demonstrate standing to challenge the grant of tax exemptions to racially discriminatory schools merely by alleging "stigmatic injury" flowing

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[49] *League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155, 161-62 (2d Cir. 1984), *cert. denied sub nom. Schmertz v. Nassau Co. Bd. Suprv.*, 469 U.S. 1108 (1985) (voters do not have standing to assert one-person, one-vote claim unless they reside in underrepresented district); *Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) (same).

from racially discriminatory governmental action, without demonstrating that they were "personally . . . denied equal treatment." *Id.* at 755.[50]

Plaintiffs also contend that plaintiff Ed Adams has established a concrete and personal injury because he is black, and because under the district court's remedial plan he would reside in a district with a greater black population percentage than that of his current district. Motion to Affirm at 29, n. 16. This claim of injury rests on the assumption that Mr. Adams, as a black voter, shares common political interests with other black voters — interests distinct from those of white voters — and therefore is harmed by being submerged in an overwhelmingly white district.

Plaintiffs would apparently purchase standing at the expense of abandoning the entire substantive theory of their case. We had thought the plaintiffs objected to the notion that black voters have commonalities of interest. After all, Mr. Adams started out in 1992 as a resident of a majority-black district (District 4 of Act 42). But plaintiffs now claim that Mr. Adams is harmed because the district has *insufficient* black population.[51] The plaintiffs' wild shift in theories could hardly provide better proof that this lawsuit

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[50]Having made no showing that they have personally been denied equal treatment by Act 1, plaintiffs are treating the federal courts as "'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Id. at 756 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973). That effort is proscribed by *Allen*. Although some lower courts have assumed that *Shaw* dispensed with any traditional standing requirement in 14th Amendment challenges to race-conscious redistricting plans, *see Shaw v. Hunt*, 861 F. Supp. at 426-27; *Vera v. Richards*, 861 F. Supp. at 1331, appellants respectfully submit that these cases are incorrect. *Shaw* did not purport to address standing to sue, and therefore cannot be read to have altered the traditional standing requirements of injury-in-fact, causation, and redressability.

[51]In fact, the court's remedial plan would have virtually no effect on the racial composition of the plaintiffs' district; it would go from 75.8% white to 72% white. In 1992, plaintiff Gary Stokely testified that black voters in Louisiana would be unable to elect a candidate of their choice in a district more than 60% white. 1992 Tr. vol. 1 at 94.

has slipped completely loose of its moorings in any cognizable injury-in-fact.

## IV. THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY IMPOSING, WITHOUT A HEARING, A REMEDY WHICH DISREGARDS VALID STATE POLICY CHOICES.

The district court's disregard of settled law in imposing its own redistricting plan, without a hearing and without giving deference to legitimate state policy choices, requires reversal. This Court has repeatedly made clear that, "even after a federal court has found a redistricting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)). Once a district court invalidates a redistricting plan, the court must "give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment." *Ibid.* The court below ignored these fundamental principles.

The district court's redistricting plan is also contrary to *Upham v. Seamon*, 456 U.S. 37 (1982). As this Court made clear in *Upham*, even when a state declines to take curative action or time constraints make legislative action unfeasible, core principles of federalism require that "a district court's modifications of a state plan [be] limited to those necessary to cure any constitutional or statutory defect," 456 U.S. at 43. The district court must "defer to the legislative judgments" to the maximum extent feasible. *Id.* at 40-41; see also *White v. Weiser*, 412 U.S. 783, 795 (1973).

The judgment entered by the three-judge court flies in the face of these principles. Here, the three-judge court imposed a reapportionment plan of its own design without even holding a remedial hearing. Consequently, the state was given no opportunity to produce evidence regarding the sufficiency of the remedy imposed or its impact on a host of important state policy choices.

Not surprisingly, therefore, the district court's remedial order tramples on the legislative judgments made by the Louisiana Legislature. The court's remedial order alters the boundaries of all of

the congressional districts, including those in areas of the state that were not even at issue in the litigation. It divides north and central Louisiana in half on an east-west basis, in an apparent effort to create two districts dominated by North Louisiana, instead of dividing these areas on a north-south basis as did the State's plan. The district court's remedial plan also takes Beauregard and part of Allen Parish, now joined with their Cajun counterparts in the southwest, and joins those parishes with Shreveport in the northwest. Moreover, no district outside of District 2 has more than a 33% black population under the court's plan. J.S. App. 30. The court's plan also pairs the District 4 incumbent, Rep. Cleo Fields, with a Republican incumbent, Rep. Richard Baker, in a 71% white district, despite the state's policy of not pairing incumbents.

Moreover, instead of imposing its plan as a temporary, interim measure, the district court's order makes its plan permanent unless Louisiana obtains court approval to change it. No authority supports the imposition of a *permanent* court-ordered redistricting plan without a hearing or opportunity to comment.

## CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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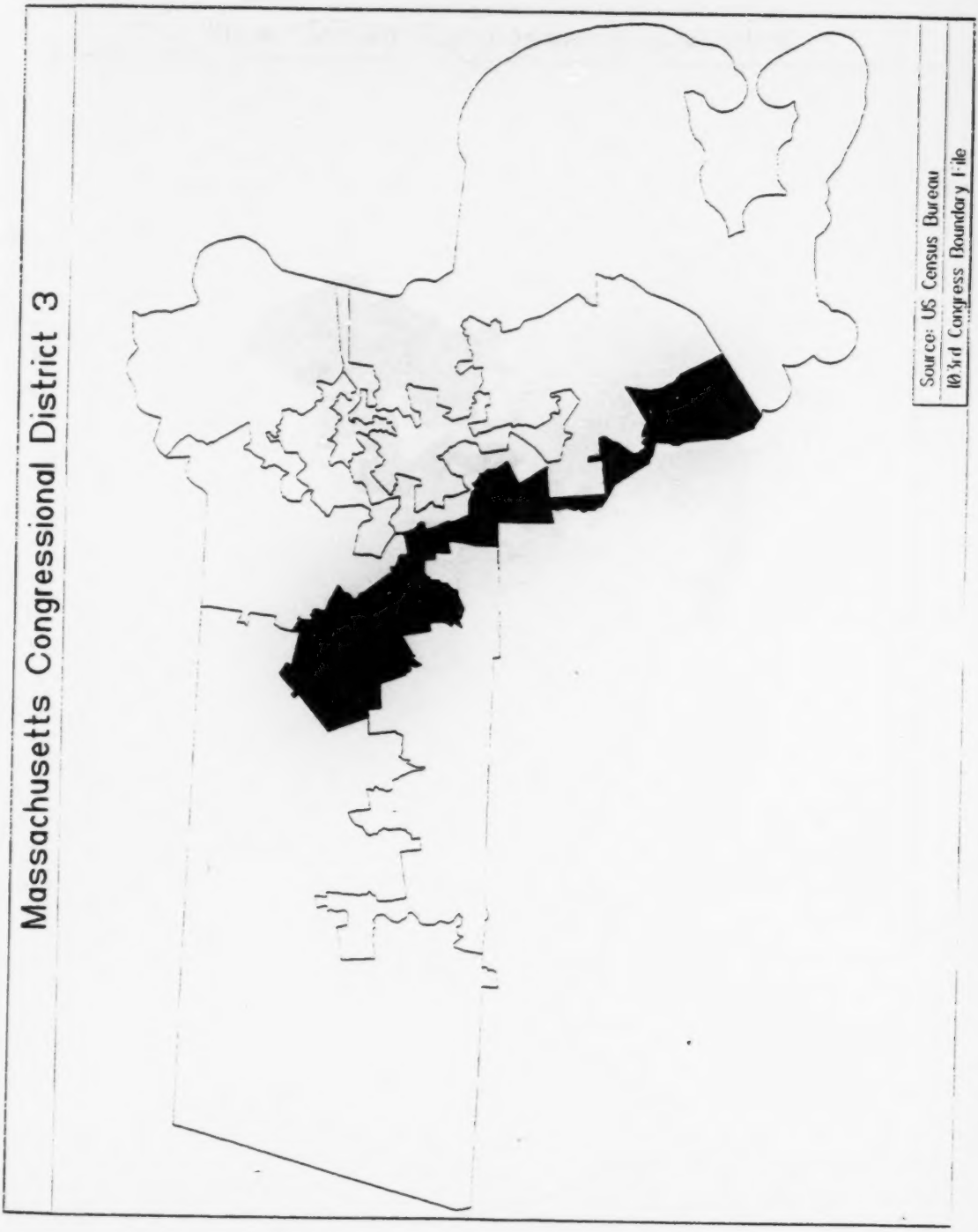
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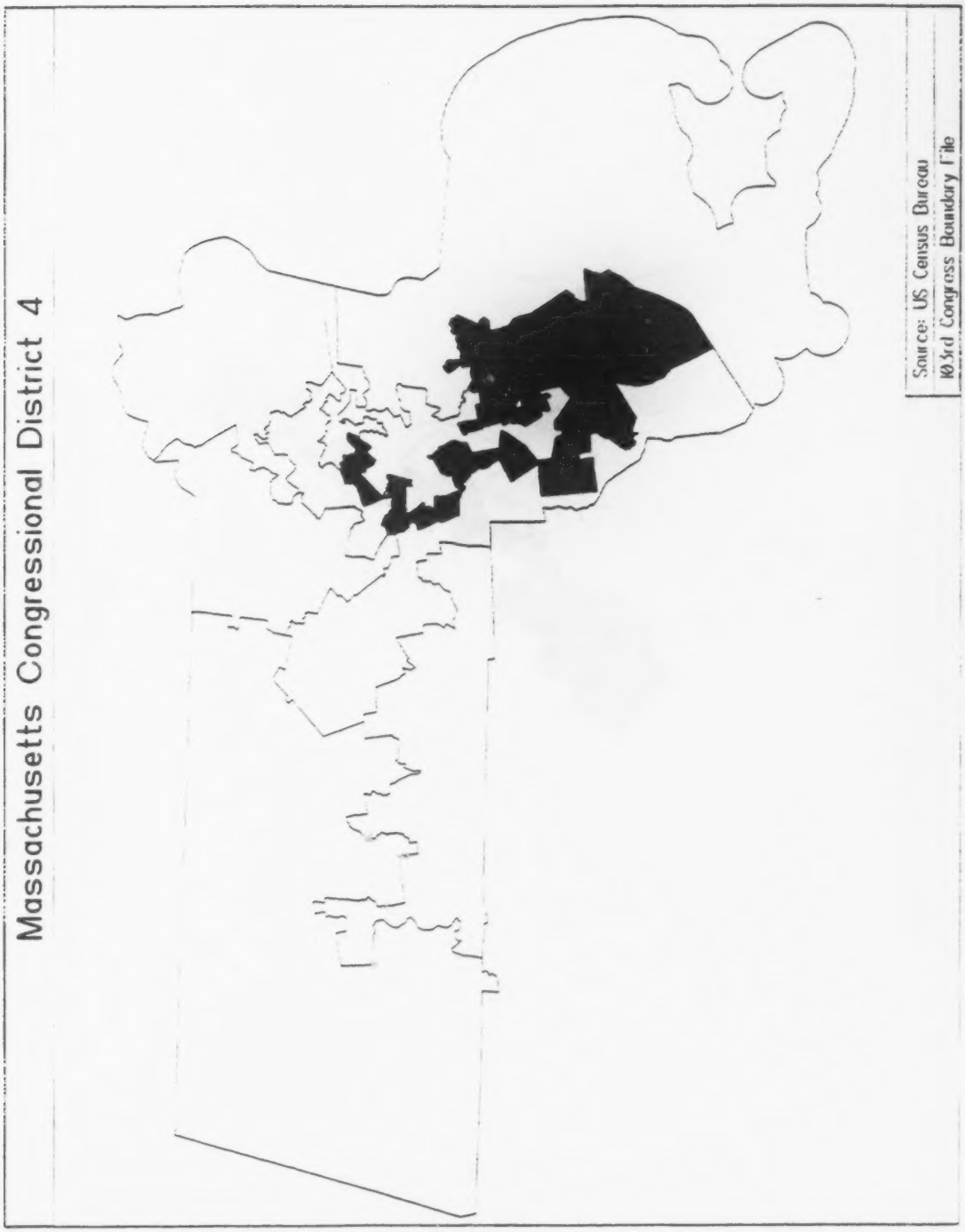
103rd Congress Boundary File


Massachusetts Congressional District 4
Source: US Census Bureau
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New Jersey Congressional District 6
Source: US Census Bureau
93rd Congress Boundary File

## New Jersey Congressional District 12

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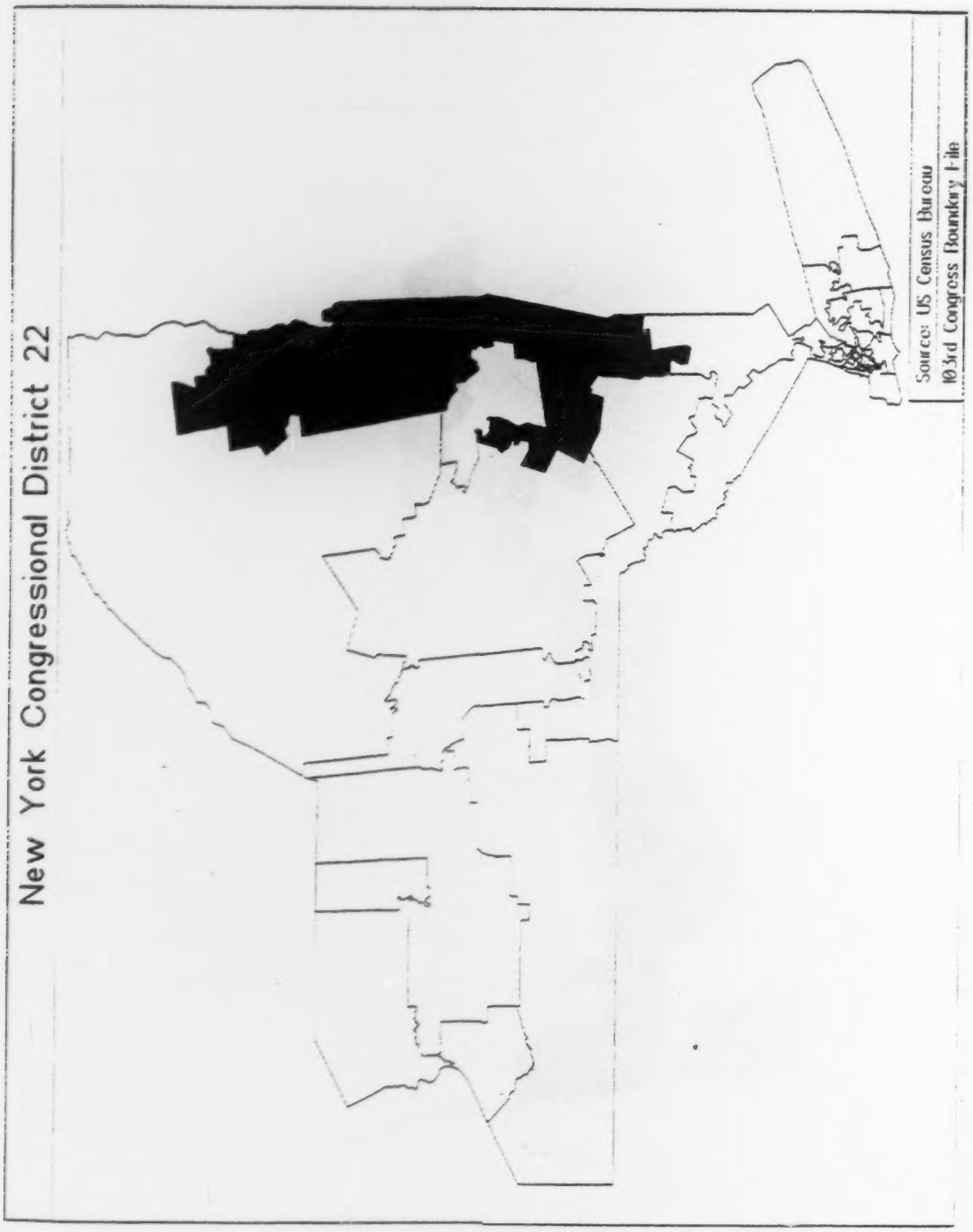
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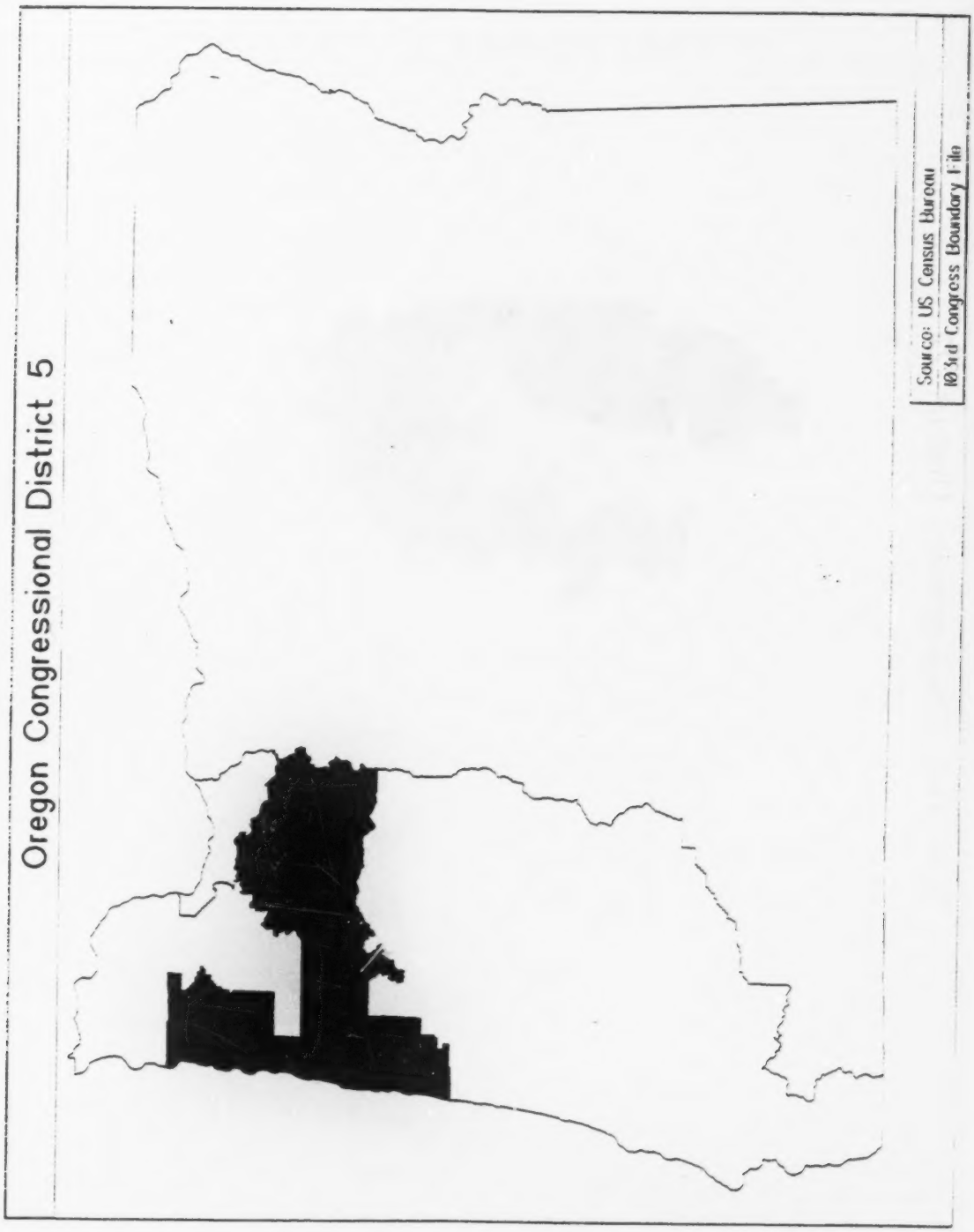
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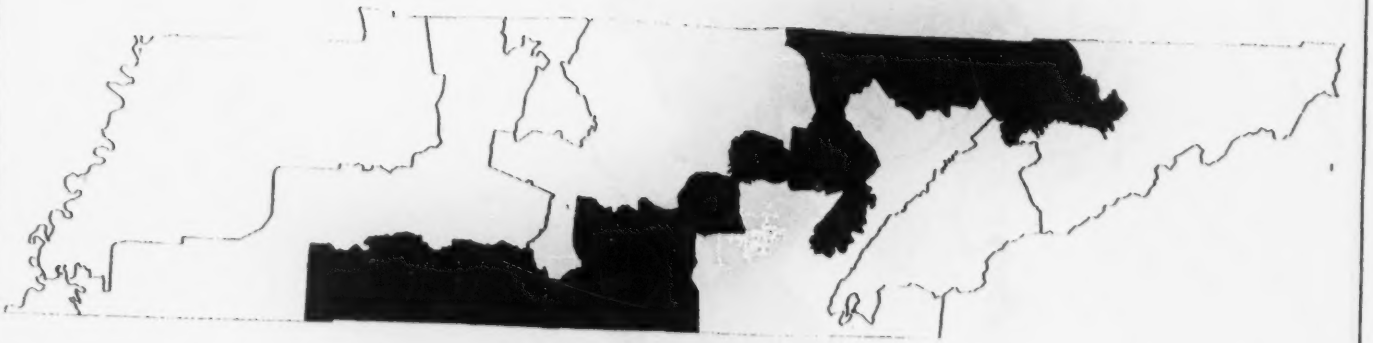

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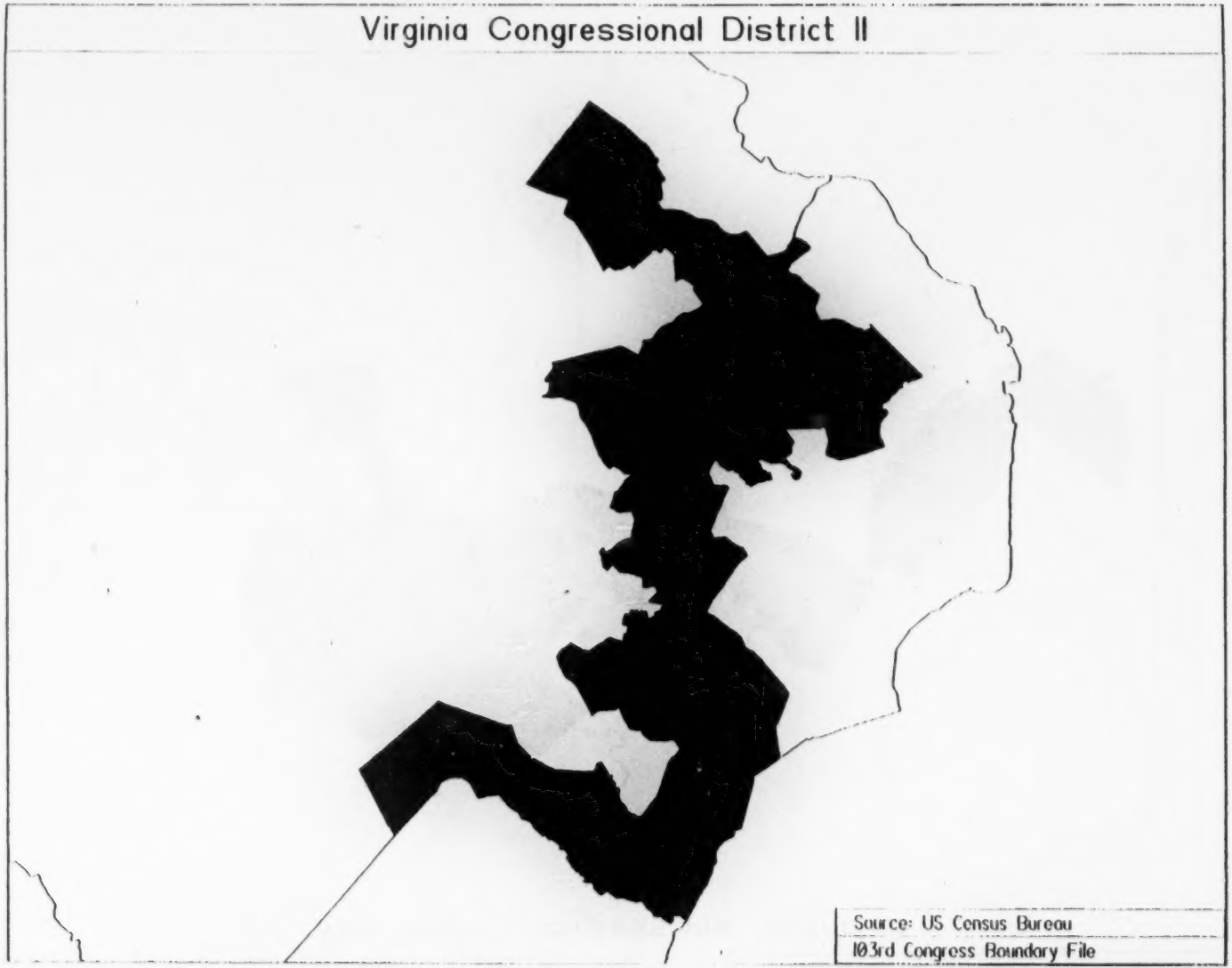
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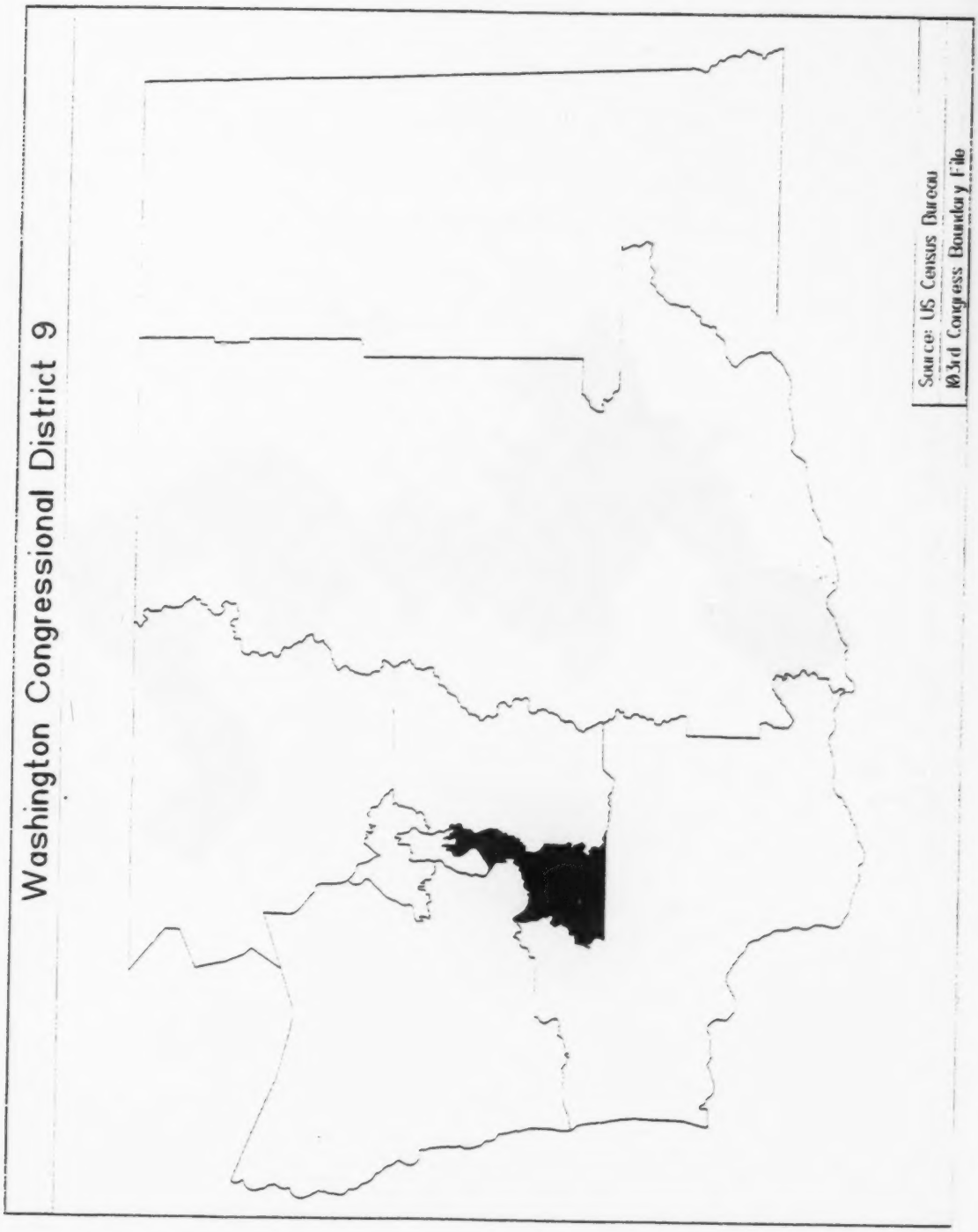
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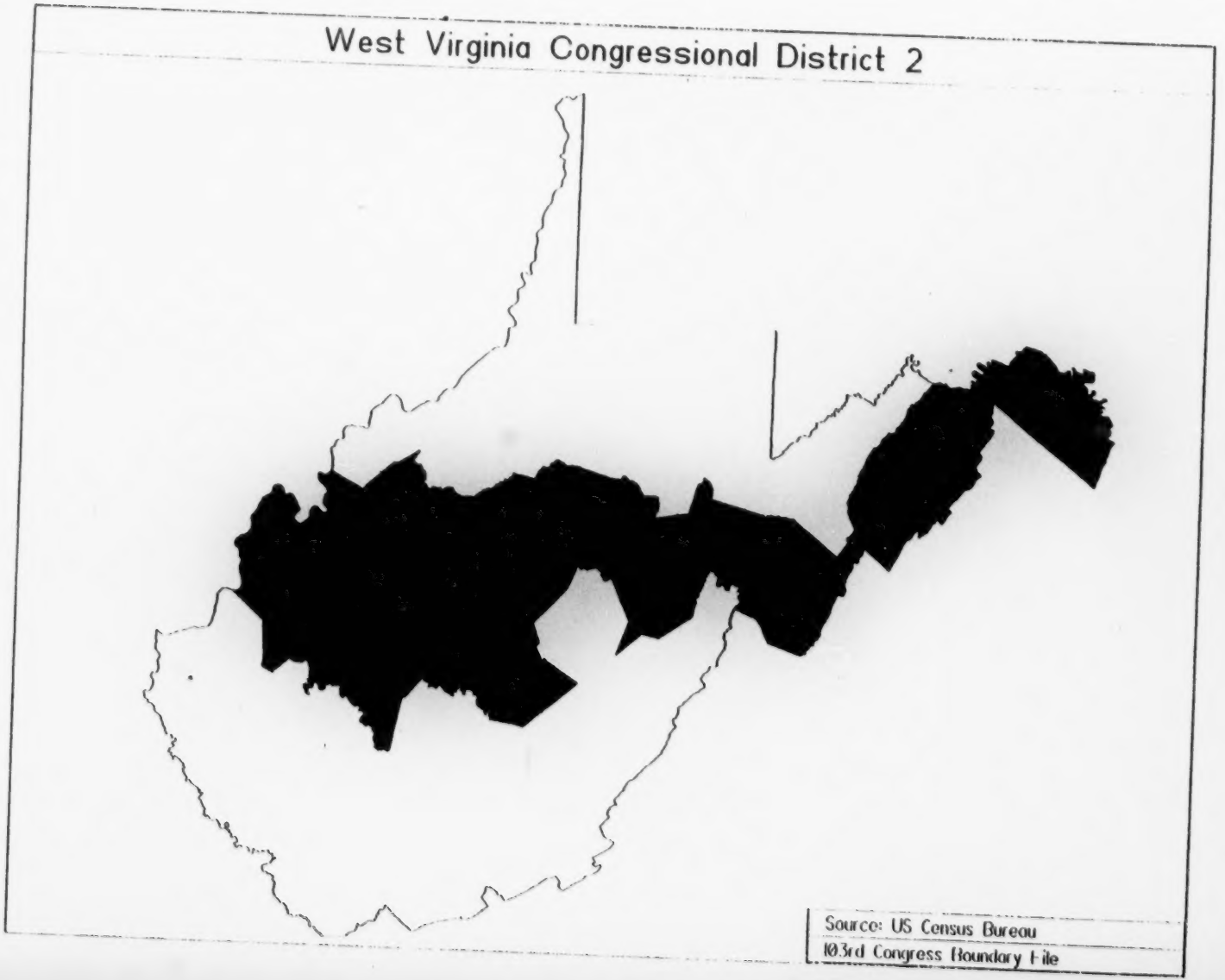
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